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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 532

THE UNITED STATES GRAPHITE COMPANY, *Petitioner*

v.

CHARLES SAWYER, SECRETARY OF COMMERCE, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

AND

BRIEF IN SUPPORT OF PETITION.

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No.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

AND

BRIEF IN SUPPORT OF PETITION.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, The United States Graphite Company, respectfully prays for the issuance of a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit to review a judgment of that Court affirming an order of the District Court of the United States for the District of Columbia, granting respondent's motion for

summary judgment. In support of this petition, The United States Graphite Company shows as follows:

OPINIONS BELOW.

The opinion of the District Court of the United States for the District of Columbia in this proceeding was entered on June 17, 1947, and is reported at 71 F. Supp. 944. The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported in 176 F. 2d 868.

JURISDICTION.

The Court below entered judgment in this case on February 28, 1949 (R. p. 111). A petition for rehearing in banc, timely filed by petitioner, was denied by the Court on October 13, 1949 (R. pp. 112-122). This petition, praying for a Writ of Certiorari, is presented to this Court on or before January 11, 1950.

The Supreme Court of the United States has jurisdiction to review the judgment of the United States Court of Appeals for the District of Columbia Circuit by reason of Section 1254 of Title 28 of the United States Code.

QUESTIONS PRESENTED.

1. Does Section 124 of the Internal Revenue Code grant respondent or his predecessor (War Production Board) discretionary power (a) to shorten the period specified therein for filing an application for a necessity certificate, or (b) to require that a determination of necessity be made before acquisition?

2. Does Section 124 of the said Code grant respondent or his predecessor (War Production Board) discretionary power to limit the amortization deduction of petitioner's machinery to "excess war cost" (35% of entire cost)?

3. In the alternative, was the unpublished policy of the War Production Board of including only "excess war

cost'' (35% of entire cost) invalid because the new policy was not published in the Federal Register and because it is in conflict with a Treasury regulation which was published in the Federal Register?

Questions 1 and 2 were answered by each lower Court in the affirmative. The lower Courts held in respect to question 3, the alternative question, that the new and unpublished policy of the Board was a part of a regulation which the Board had adopted and published in the Federal Register in December, 1943, which publication was prior to the adoption of the new policy in respect to excess war cost. The dissenting opinion by Judge Miller of the Court of Appeals for the District of Columbia answered questions 1 and 2 in the negative. He did not consider question 3 as it is an alternative to question 2.

STATUTES AND REGULATIONS.

The essential provisions of the statutes, the regulations and the unpublished policy of the War Production Board, which are lengthy, have been briefly summarized under the "Statement of the Case.'' These documents are printed in an Appendix attached to this petition and brief.

STATEMENT OF CASE.

At the outset of the national emergency, created by the outbreak of war in 1939, the National Administration and Congress determined that prompt steps must be taken to increase manufacturing facilities in this country to meet the requirements of national defense. Upon the recommendation of the National Administration the Congress in 1940 enacted Section 124 of the Internal Revenue Code for the stated purpose of inducing private enterprise in this country to invest its own capital in the expansion of manufacturing facilities for national defense purposes (R.* 53; H. Rept. No. 2894, 76th Cong. 3d Sess. pp. 16-17).

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*"R" is used throughout this Petition to designate the Transcript of Record.

The law granted a special amortization deduction (sometimes referred to as depreciation) for income and excess profits tax purposes for each facility acquired or constructed, provided the War or Navy Department certified that the facility was necessary in the interest of national defense.

Petitioner is a manufacturer of graphitar. During the emergency period this product was used in the manufacture of marine and aircraft engines. Graphitar, which is not affected by heat, cold, acids, water or sand, was especially vital because it became a substitute for many metals which were scarce at that time. (R. pp. 6-8, ¶10).

In 1943, while petitioner's existing plant and machinery capacity were working full time on Government contracts, the War Department requested that petitioner double its capacity for the production of graphitar. As soon as petitioner could secure the necessary purchase rating priorities from the War Production Board, which had a rigid control over all expansions under the War Powers Act, petitioner began work on a new building (R. pp. 6-10, ¶10-13).

Petitioner contends that Section 124 of the Internal Revenue Code (26 U. S. C., Sec. 124) provides that (a) if a taxpayer files an application for a necessity certificate with the War Department within six months *after* construction or acquisition of a facility, and (b) if the War Department issues a necessity certificate that the facility is an emergency facility necessary in the interest of national defense, then the taxpayer is entitled to amortize the cost of the facility over five years, or a shorter period if the President by proclamation determines that the emergency period was less than five years (Appendix, pp. 48-59).

In order to secure this special tax deduction, petitioner duly filed with the War Department an application for a necessity certificate for the new building. On October 28, 1943 the War Department issued a necessity certificate, stating that the new building was necessary in the interest

of national defense, and included in the certificate the entire cost of the building for special amortization purposes (R. p. 11, ¶ 15, 16).

When the new building was sufficiently completed so that space was available, and as soon as petitioner could secure from the War Production Board necessary purchase rating priorities for the machinery, petitioner began to purchase the machinery which was to be used in the new building to manufacture graphitar, (R. pp. 11-12, ¶ 17). On May 29, 1944 petitioner filed with the War Production Board an application for a necessity certificate for the machinery. Petitioner contends that this application was timely filed under subsection (f) (3) of Section 124 within six months after acquisition of the machinery. The application was not filed with the War Department, as had been done in the case of the building, because on December 17, 1943 the authority to issue necessity certificates had been transferred from the War and Navy Departments to the War Production Board by a Presidential Order (R. pp. 4 and 13-14, ¶ 7, 20).

On July 17, 1944 the War Production Board issued to petitioner a "letter of predetermination" which stated that it had been determined that the machinery listed in the Appendix attached to the letter (which was a duplicate copy of the list of machinery which had been attached to petitioner's application) is eligible for tax amortization, and further stated that "you may accept this letter as a determination of necessity" pending the receipt of the necessity certificate (R. p. 15, ¶ 22; R. pp. 35-40, Ex. 2).

Petitioner contends that this "letter of predetermination" also inserted two illegal conditions limiting the amount of special amortization which petitioner could deduct for the machinery by stating that (a) cost for machinery acquired prior to July 17, 1944, the date of the "letter of predetermination," had to be excluded, and that (b) machinery acquired after July 17, 1944 could be amortized only on a 35% basis. Neither of these conditions had been

attached to the necessity certificate which had been issued by the War Department for the new building (R. pp. 15-16, ¶ 22; R. pp. 35-36, Ex. 2).

The War Production Board had inserted the first condition in the "letter of predetermination" because immediately upon the transfer of the duties under Section 124 to it, the Board issued a regulation (Section 4), which provides that an application for a necessity certificate had to be filed *before* constructing or acquiring a facility. Petitioner's complaint alleges that this regulation is contrary to subsection (f) (3) of Section 124, which provides that an application may be filed within six months *after* the beginning of construction or acquisition of a facility (R. pp. 20-21, ¶ 27).[1]

This regulation, which was issued under a Presidential Order, presents the first question in this proceeding: Did the War Production Board have discretionary power to shorten by regulation the definite date fixed by Congress for filing an application for a necessity certificate and to require that a determination of necessity be made before acquisition of the facility?

The second condition was inserted in the "letter of predetermination" because shortly after the transfer of the duties to it the Board adopted a new policy of including only excess war cost (35% of entire cost).[2] Under this policy, there was included in the amount of cost specified in the Certificate only 35% of the entire cost of facilities certified as necessary to national defense, because the facilities "were of such nature as to be presumably useful in post-war operations." (R. pp. 19-20, ¶ 26 of Complaint, and R. pp. 48-50, Respondent's affidavit.) The 35% allowance was intended to cover the excess cost of wartime acquisition as compared with normal pre-war cost of the

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[1] Subsection (f) (3) of the statute and Section 4 of the regulations are set forth in the Appendix to this Petition.

[2] This unpublished policy is quoted in the Appendix hereof, pp. 68-71.

same facilities. This policy, which was not published in the Federal Register or in any other manner, was not only contrary to the policy followed by the Secretaries of War and Navy during the three years they acted as certifying agents, but was contrary to a published Treasury Department regulation which provided that the entire cost of an emergency facility should be amortized over the emergency period of five years or less.[3] Petitioner alleged in its complaint that the "35% policy" is contrary to section 124(f) (1), which provides that cost (not excess war cost) shall be included for amortization purposes.[4]

This unpublished policy presents this second question: Did the War Production Board have discretionary power, under Section 124(f)(1), to limit the special amortization deduction to 35 percent of the cost of petitioner's facilities which the Board had determined were necessary in the interest of national defense?

An alternative question is also presented by this unpublished policy: Was this unpublished policy of the Board invalid because the new policy was not published in the Federal Register and because it is in conflict with a Treasury regulation which was published in the Federal Register?

After petitioner had, pursuant to the "letter of predetermination," filed an affidavit showing (a) cost of machinery acquired prior to July 17, 1944, and (b) cost of machinery acquired on or after July 17, 1944, the War Production Board issued a necessity certificate for the machinery, but excluded $77,195.99 which was the entire cost of machinery acquired prior to July 17, 1944, and included only excess war cost (35% of entire cost) for the machinery acquired on or after July 17, 1944. The cost

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[3] Regulation III, Sec. 29. 124-6, published in Part 29, Title 26, Code of Federal Regulations, Cum. Sup., and amendments thereto in 10 F. R. 919, is quoted in part at p. 36 herein and in full in the Appendix hereof, pp. 62-66.

[4] Subsection (f) (1) is quoted in the Appendix hereof, page 54.

excluded for the latter machinery amounted to $98,617.36 (R. pp. 23-24, ¶ 28).

Petitioner requested the District Court to order respondent to issue a corrected certificate so as to include the entire cost of all the machinery, whether acquired before or after July 17, 1944 (R. pp. 24-25, ¶ 29). Respondent first filed a motion to dismiss (R. pp. 41) and subsequently filed a motion for summary judgment (R. p. 87). The District Court in a written opinion (R. p. 87) held that the War Production Board had discretionary power to shorten by regulation the specific date fixed by the statute for filing an application for a necessity certificate, and that the regulation was a reasonable interpretation of subsection (f)(3) of Section 124. The District Court further held that the Board also had discretionary power to adopt and apply the unpublished policy in respect to including only excess war cost for facilities which had presumptive post war use; that the policy was a part of a regulation of the War Production Board which provided that in issuing a certificate consideration must be given as to whether it was to the advantage of the Government to have a facility publicly or privately financed; and that the unpublished policy was a reasonable interpretation of subsection (f)(1). Subsequently the Court entered a final order for respondent on its motion for summary judgment (R. p. 92).

Petitioner took a timely appeal to the Court of Appeals for the District of Columbia Circuit (R. p. 93). On February 28, 1949, a divided Court affirmed the District Court (R. p. 105). The majority of the Division, which consisted of three Circuit Judges, entered a *per curiam,* affirming on the opinion of the District Court. Judge Wilbur K. Miller of the Court of Appeals wrote a dissenting opinion sustaining the petitioner's position in full (R. pp. 105-110).

Petitioner filed a timely Petition for Rehearing before the Circuit Court sitting In Banc (R. pp. 112-122). On October 13, 1949, this Petition was denied by the same three-judge Division, which had heard the original appeal (R. p. 122).

SPECIFICATION OF ERRORS TO BE URGED IF A WRIT IS ISSUED.

The Court below erred in its decision in the following respects:

1. Its interpretation of Section 124(f)(1) nullifies and deletes important words employed by Congress in the statute.

2. Its interpretation of Section 124(f)(1) is directly contrary to the intent of Congress consistently expressed without contradiction in the legislative record of the enactment, which intent this Court has repeatedly held to be the controlling factor in statutory interpretation.

3. The unpublished policy of the Board with respect to certifying for tax amortization only 35 percent of the cost of necessary war facilities is void because it is in conflict with both Section 124(f)(1) of the Internal Revenue Code and the regulations of the Commissioner of Internal Revenue published pursuant thereto.

4. The failure of the Board to publish in the Federal Register its rule of certifying only the "excess war cost" of emergency facilities having presumptive post-war utility renders the rule invalid.

5. The regulation of the Board requiring taxpayers to apply and obtain Necessity Certificates before acquiring necessary war facilities is invalid because it is in conflict both with the language and legislative intent of Section 124(f)(3) of the Internal Revenue Code and with the controlling regulation of the Commissioner of Internal Revenue.

REASONS FOR GRANTING THE WRIT, AND SUPPORTING BRIEF.

Few cases present more compelling reasons for granting certiorari than this one. Considered together, they take this case out of the ordinary class of litigation in which a petition for a Writ is so frequently filed.

The decision below is in conflict in principle with decisions of other lower courts which have considered the legislative intent of Section 124 and with applicable decisions of this Court. It relies on a line of cases wholly irrelevant to the real issues here.

But perhaps its most striking features are the contradictions in almost every phase of this proceeding. For example, the plain words of the statute in issue seem to say that a Necessity Certificate is valid for tax amortization purposes if applied for within six months after purchase of machinery for the manufacture of war materials; yet the majority below held that petitioner could not obtain a valid Certificate unless it made application before it purchased the machinery. The paradoxical result of that holding is that machinery purchased in the midst of the war and placed in use exclusively for the production of essential war materials was "not necessary" for national defense, while non-existent machinery to be purchased when and if available was "necessary" to immediate prosecution of the war. Similarly, an unpublished rule of the War Production Board, sharply curtailing the tax amortization rights of several thousand taxpayers, was held to prevail over a directly contradictory Regulation of the Commissioner of Internal Revenue, issued under Section 124(f)(1) of the Internal Revenue Code and properly published in the Federal Register. The Commissioner's Regulation states positively that the entire cost of machinery certified as necessary to national defense shall be entitled to tax amortization over the duration of the war period. But the Court below sustained as valid a wholly inconsistent intraoffice rule of the War Production

Board that only 35 percent of the cost of machinery necessary in its entirety to national defense was entitled to tax amortization. The latter rule was never published in the Federal Register as required by law.

Yet that is not the end of the paradoxes. A judge sitting on this case in the Court below, who had been a member of the Senate committee which developed the amortization statute, declared as a Senator that the law provided for the amortization of the entire cost of necessary machinery for war factories. But the opinion which he and one of his colleagues have adopted holds that only "excess war cost" (presumed to be 35 percent of total cost) is amortizable over the war period.

Finally, the whole legislative history of Section 124 consistently discloses Congress rejected the policy applied by the War Production Board in its dealings with this petitioner and that the intention of Congress was to permit taxpayers—at their own election—to amortize entire cost of necessary facilities. But the decision, which petitioner asks this Court to review, holds that the War Production Board's restriction of amortization to "excess war cost" was in furtherance of the legislative purpose of the statute.

1. The issues present grave questions of public policy relating to national defense and safety.

The fundamental underlying issue in this case is whether Congress made solemn statutory promises to induce the quick conversion of industry to war production, which were broken by the action of an administrative agency because it concluded that the Congressional policy written into the statute was undesirable.

The proceeding involves the interpretation of a statute which was deemed vital to national defense during the national emergency created by the outbreak of World War II.[5]

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[5] H. Rept. No. 2894, 76th Cong., 3d Sess., pp. 2, 16; Joint Hearings Before Committee on Ways and Means and Committee on Finance, 76th Cong., 3d Sess., Aug. 9-14, 1940; R. pp. 52-79.

It requires a determination of the intent of Congress with respect to a policy essential to the effective and speedy mobilization of industrial production in every period of national war emergency.

Excerpts from the report of Robert P. Patterson, Under Secretary of War, will disclose the vital importance of the amortization policy to the national interest (R. pp. 52-54):

> "Wars are often lost before the first shot is fired.
>
> "Fortunately, enough Americans realized this back in 1940. * * * we were totally lacking in facilities capable of producing the vast quantities of munitions that would be required. Immediate action was needed to avert the fate of other unprepared nations.
>
> "Congress passed laws to get the men it knew we would need for our armed forces and to get the material with which to arm them. The Selective Training and Service Act was passed in September 1940 to get the men. The Tax Amortization law was passed in October 1940 to help get the material.
>
> "Private industry was naturally reluctant to risk its funds in the creation of war facilities. *The Tax Amortization law was designed by Congress to give industry protection against possible bankruptcy and to encourage it to use its capital in building war facilities. The law did this by allowing a write-off of the cost of the facilities within a period of five years.*
>
> "This measure enabled us as a Nation to rely upon private industry for part of the needed expansion. It gave us the opportunity to build with speed the necessary facilities, not only to defend our shores but to attack the enemy without let-up.
>
> * * * * * * * *
>
> "It is one chapter in the record of how this Nation, operating within a system of private enterprise which our enemies sneered at as stupid and inefficient, was able to arm itself with greater speed and thoroughness than any other Nation in history." (Italics supplied)

In such a setting are not the issues thus raised vital questions of national policy? Do they not affect both

national defense and safety of the recent past and of the future as well? Is it not the duty of this Court to pass upon the validity of the widely held opinion that in administering the Tax Amortization law, a solemn pledge of the Congress, made to American industry in a time of crisis, has been callously broken?[6]

Plainly the decision below is detrimental to any national defense program of the future. The promise of amortization of entire cost during the emergency period was repeatedly made to industry in the public statements of administrative officials, including the President, and of Congressional leaders (R. pp. 56-57; Hearings before Senate Committee on Finance on Second Revenue Act of 1940, 76th Cong., 3d. Sess. (1940) 158; Cong. Rec. Aug. 29, 1940, pp. 11239-11240, et seq.). Small industrial enterprises, such as this petitioner, in particular might be slow to accept again the financial burdens of war expansion if the rules fixed by statute can be changed by administrative action to reduce the amortization deduction from 100 percent to 35 percent—and even to take it away altogether.

Petitioner doubled its plant capacity in 1943 and 1944. The new building cost about $100,000 (R. p. 9); the new machinery about $250,000 (R. p. 16). The Secretary of War certified the building for amortization without restriction. But when petitioner sought a Certificate for the necessary machinery, a different Government agency had succeeded to the certifying power.

Without any warning by public notice or otherwise, petitioner discovered that the rules had been changed. Only the "excess war cost" of its machinery could be amortized over the emergency period, said the Board (R. p. 35).

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[6] Indicative of the importance of these issues is the fact that Columbia University Law School has selected this case for its Moot Court competition in the Spring of 1950, according to advice received by petitioner's counsel from the Moot Court Executive Committee. See also, James P. Durkin, Comments on the Administration of Section 124 of the Internal Revenue Code, Georgetown Law Journal, Volume 34, No. 3 (March 1946), pp. 324-341.

Without even making a gesture of obtaining any facts, the Board *presumed* that machinery for the manufacture of a highly-specialized product—the demand for which had increased solely because of a temporary shortage of metals —would have post-war use (R. pp. 48, 84).

Thus was petitioner confronted with financial circumstances totally unexpected: capital expended or committed to be expended for what would almost undoubtedly be over-expanded facilities after the war, and its amortization right reduced from 100 to 35 percent of cost. Yet petitioner could not refuse to complete the new plant. There was no evidence when the military demand for "graphitar" would cease. It owned a new building, 100 percent amortizable, but useless without machinery.

Petitioner had no choice but to risk financial disaster by completing its investment and seek redress in the Courts.

As stated in the dissenting opinion of the Court below (R. p. 110):

> ". . . . The result in this case is so incongruous as to be almost grotesque. Here the War Department, badly in need of large quantities of graphitar, insisted that the appellant erect a new building and equip it with the necessary machinery, which the appellant proceeded to do. The Secretary of War certified the building to have been necessary in the interest of national defense. It does not comport with common sense for the War Production Board in 1944 to certify that only 35 per cent of a fraction of the cost of the machinery was necessary in the interest of national defense. The building alone could not produce graphitar and yet the building was certified as necessary in its entirety. It is not suggested that the need for graphitar was any less pressing in 1944 than in 1943."

It has frequently been said that "Men must turn square corners when they deal with the Government" (*R. I., Ark. & Louisiana R. R. Co.* v. *United States,* 254 U. S. 141, 143). But it is equally true that square corners do not "constitute a one-way street." *Federal Crop. Ins. Corp.* v. *Mer-*

rill, 332 U. S. 380, dissenting opinion at page 388. In the instant situation, large corporations were financially able to seize at once upon the statutory offer of full amortization. Government pressure to convert was applied to them first. They responded, and nearly 5 billion dollars worth of such war facilities of the very kind involved here were certified by the War Department for full amortization without restriction between October 1940 and December 17, 1943, (R. 75-77).

But when smaller enterprises, such as this petitioner, were subsequently induced to undertake proportionately greater financial risks, they found themselves caught in the shifting sands of a secretly adopted administrative policy to prohibit amortization of the cost of necessary war facilities to 35 percent of total cost. The War Production Board, to which petitioner was required to apply for a certificate after the certifying power was transferred from the Secretaries of War and Navy, processed applications covering only 1½ billion dollars worth of facilities and certified only about one-tenth of the total facilities which were certified under the amortization statute (R. 50-51). It is with respect to this last one-tenth that the injustice has been done. The Government did not turn the same square corners it requires of its citizens. The mere incident of expanding in the early months of 1944 instead of prior to December 17, 1943, cost petitioner the very right which was held out to it as the inducement to expand. Can such enterprises be expected to rely again with the same faith on the statutory promises of Congress?

Small business is the backbone of our competitive system of private enterprise. To deprive this country of its wholehearted cooperation in a time of war emergency will sap the industrial strength of this nation. Petitioner submits that to permit the decision of the Court below to stand without review here will almost inevitably produce that result.

This Court has been diligent in its protection of the rights of individuals in a democratic society. From the bitter experiences of others, this nation is learning that a system of competitive private enterprise is the mainstay of a political democracy, and therefore, of individual rights. Private industry, and small enterprises in particular, look to this Court for similar protection when the rights conferred upon them by a democratic legislature have been trampled by administrative excess. It is respectfully urged that this petitioner is peculiarly entitled to have this Court, by Writ of Certiorari, determine the legality of the apparent inequity imposed upon it.

2. The decision of the Court below affects the rights and property of a very substantial number of similarly situated taxpayers, and the action of this Court will resolve impending litigation in numerous similar cases.

In both Courts below respondent emphasized that this issue involved many millions of dollars, and that the final decision was important to many taxpayers as well as to the Government. The importance of this issue is disclosed by the affidavit of the Chief of the Tax Amortization Branch of the War Production Board (R. pp. 50-51). This affidavit clearly shows that many tax paying entities and individuals have been affected by the administrative action sought to be corrected here.

Counsel for this petitioner has personal knowledge that cases involving more than 50 Necessity Certificates issued for 35 percent of the cost of facilities determined in their entirety to be necessary in the interest of national defense are being held in abeyance awaiting the outcome of the present proceeding. The total cost of facilities partially covered by those Certificates is in excess of $10,000,000. Counsel has also been advised by other attorneys that there are other cases involving a substantial number of percent-

age certificates which are awaiting final disposition of the instant case.

The rights of all these taxpayers ought not to be cut off without a full review of the issues by this Court.

Moreover, if this Court decides that the administrative action here complained of should be corrected, it will not affect the revenues to the extent respondent has so vigorously contended below. Taxpayers who have been permitted to amortize the entire cost of emergency facilities during the war period, can obtain no further depreciation deductions for tax purposes in later years. Thus, if these war facilities of petitioner are useful in post-war operations all the income earned from their use becomes taxable without diminution for depreciation in the post-war years.

3. The decision below conflicts in principle with other lower court decisions interpreting Section 124.

The opinion below with respect to the intent of Congress in enacting Section 124 is squarely in conflict with the legislative history found and relied upon by the District Court for the Eastern District of Pennsylvania and by the Tax Court in two recent cases.

In *United States* v. *Milnor Corp.*, 85 F. Supp. 931 (D. Ct. for E. D., Pa., Sept. 14, 1949) the Court found that:

> " * * * When the legislation was first considered in 1940, * * * Government officers who sponsored it * * * explained that the purpose of the bill was to provide for 'accelerated depreciation' * * * for new defense plants so that taxpayers putting their capital in emergency facilities could claim allowances for the depreciation of the facilities over the expected period of the emergency rather than over the expected physical lives of the plants. * * * "

This finding is precisely the interpretation of Section 124, for which petitioner here contends (see *infra*, pp. 19-27),

and is in conflict with the finding of the Court below as to the legislative history of Section 124.

Similarly, the Tax Court in *American Twist Drill Co.*, 11 T. C. 200, was called upon to interpret Section 124(f)(3). There the taxpayer obtained a Necessity Certificate from the Secretary of War upon application made after the commencement of construction or installation of its war facilities. It covered entire cost of the facilities. When it was submitted to the Commissioner in support of an amortization deduction, he disallowed the special deduction on the ground that the taxpayer had not filed application for the certificate within six months after commencement of the construction or installation.[7] The Tax Court reviewed the legislative history of Section 124(f)(3) and found exactly what petitioner contends for in this case, i.e., "that Congress provided that the application must be filed within six months from the beginning of construction of the machines." (see *infra*, Points 4(b) and 6). That Court further held (p. 204):

> " * * * The certificate was applied for January 30, 1942. To comply with the requirements of the statute, therefore, petitioner must prove that the beginning of such construction was on or after July 30, 1941."

The Court found construction had commenced earlier than that date and concluded "that petitioner failed to comply with the mandatory requirement of Section 124(f)(3)."

The opinion of the Tax Court cannot be squared with the decision of the Court below on this point, which holds in effect that the War Production Board could disregard Section 124(f)(3) and require application *before* purchase of

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[7] The Tax Court remedy was not available to petitioner in the instant case. It had no formal Necessity Certificate supporting an amortization deduction to present to the Commissioner covering any part of the cost of facilities purchased before making application for a Certificate. The Board's "letter of predetermination" shows those facilities were in fact determined to be necessary (R. p. 35), but inclusion of those facilities in the formal Certificate issued by the Board was refused. Hence this proceeding to compel performance of a ministerial act.

the facilities instead of within six months *after* purchase. The Board did much more than "shorten" the six months' period, as concluded by the Court below (R. p. 90); it wiped it out altogether and completely nullified the statute.

These decisions of these other lower courts emphasize that the interpretation of Section 124 is a current judicial problem. The conflicting judicial declarations of the intent of Congress should be resolved by a definitive decision of this Court.

4. The decision of the Court below has so far departed from the legal principles laid down in the applicable decisions of this Court that this Court ought to intervene in the interests of administering justice

The decision below is shockingly wrong. Seldom has an opinion done such violence to the intention of Congress as revealed by the language of the statute and its legislative history in Committee hearings, reports and debates. This is true of both the subsections of section 124 which are here in issue. We shall discuss the interpretation of the two subsections separately.

a. *The Court below in its interpretation of Section 124(f)(1) has nullified words of the statute and has given it a meaning directly contrary to the intent of Congress as shown by its legislative history.*

In the first place, the construction of Section 124(f)(1) adopted by the Court below nullifies and deletes essential words employed by Congress in the statute.

Section 124(f)(1) provides as follows:

> " . . . In determining, for the purposes of subsection (a) . . . the adjusted basis [i.e. total cost] of an emergency facility—
>
> "(1) There shall be included only so much of the amount otherwise constituting such adjusted basis as is properly attributable to such construction . . . or acquisition after December 31, 1939, as either the

> Secretary of War or the Secretary of the Navy has certified as necessary in the interest of national defense during the emergency period . . . "

The opinion of the District Court, adopted by the majority of the Court of Appeals, deletes the word "such" before the word "construction," and the phrase "otherwise constituting such adjusted basis," thereby amending the statute to read (R. p. 91):

> " . . . there shall be included ONLY SO MUCH of the amount as is properly attributable to acquisition after December 31, 1939, as either the Secretary of War or the Secretary of the Navy . . . has certified as necessary in the interest of national defense, . . . " [Emphasis by the Court]

The lower Court by this deletion reaches the conclusion that the Secretaries of War and Navy (later the War Production Board) were given discretionary power to certify the amount of cost (in the statute, "adjusted basis") which the taxpayer might amortize.

But that interpretation renders superfluous the word "such". As the dissenting opinion of the Court of Appeals points out (R. p. 109):

> " . . . I suggest, with deference, that the foregoing is a distortion of the grammatical construction of the statutory sentence. It leaves out significant words in the statute, as I have pointed out heretofore. For the statute says 'only so much of the amount * * * as is properly attributable to such construction * * * as * * * the Secretary * * * has certified as necessary in the interest of national defense.' Obviously the meaning is 'such construction as the Secretary has certified as necessary'; therefore, that there shall be included only so much of the cost as is properly attributable to such construction, after the critical date, as has been certified as necessary. If that were not true, the word 'such' before the word 'construction' would be without significance."

Furthermore, the words "only so much of the amount," emphasized by the District Court, in fact refer to and are modified by "as is . . . attributable to . . . construction . . . or acquisition after December 31, 1939." The District Court has mistakenly held they are modified by the phrase "as either the Secretary of War or . . . Navy has certified . . ." Instead, the latter phrase, in fact, modifies "such construction . . . or acquisition." Thus, when the statute is properly read, it is plain that the power of the certifying agent is entirely divorced from "amount" of cost, and is limited to certifying "construction . . . or acquisition," i.e., to a determination of the necessity of the actual physical facility.

In view of this deletion and nullification, unsupported by any other of the aids to statutory construction, the decision of the Court below as to the meaning of Section 124(f)(1) is contrary to the applicable decisions of this Court. In *Ex Parte Public Nat. Bank,* 278 U. S. 101, at 104, it was stated:

> " . . . We are asked to ignore the quoted words and read the section as though they were not there.
>
> "But we are not at liberty thus to deny effect to a part of a statute. No rule of statutory construction has been more definitely stated or more often repeated than the cardinal rule that 'significance and effect shall, if possible, be accorded to every word.' . . . "

To the same effect are *McDonald* v. *Thompson,* 305 U. S. 263, 266; *United States* v. *Wurts,* 303 U. S. 414, 417.

In rejecting a construction of a section of the Bituminous Coal Conservation Act pressed upon it by one of the parties in *Sunshine Anthracite Coal Co.* v. *Adkins,* 310 U. S. 381, this Court held (pp. 392-393):

> " . . . To sustain appellant's position we would not only have to substitute 'is' for 'would be;' we would have to override the express congressional plan * * *. That would be not only to rewrite § 3(b) but to remake the whole statutory scheme. Obviously such a task is not for the courts."

Yet that is precisely what the Court below has undertaken to do. It has changed the words of the statute and thus permits the War Production Board to override the language, plan and policy expressly adopted by Congress.

In the second place, *the construction given to subsection (f) (1) is directly contrary to the legislative intent* expressed by Congress in committee hearings, reports and debates.

The proper rules of statutory construction have been laid down in positive terms by the decisions of this Court. One of the best recent expositions of the rules of interpretation is contained in *United States* v. *American Trucking Associations,* 310 U. S. 534. In that case, Mr. Justice Reed, speaking for the Court, said (p. 542):

> "In the interpretation of statutes, the function of the courts is easily stated. It is to construe the language so as to give effect to the intent of Congress. . . . "

Petitioner submits that the Court below disregarded this rule of statutory interpretation and construed the statute to produce a result in conflict with the plainly and consistently declared intention of Congress.

The intent of Congress that the certifying authority was to have no discretion with respect to the amount of cost to be amortized is demonstrated by two or three excerpts from the records of the Congressional Committees:

> "Senator George. Is the certificate that is issued on the recommendation of the National Council and the Secretary of War or Navy, as the case may be, limited to mere certification that the particular facility is necessary for defense, or do they go further and specify what the depreciation and obsolescence amount to?
>
> "Mr. Sullivan. No; they do not.
>
> "Senator George. They turn that back to the Treasury?
>
> "Mr. Sullivan. No, sir; under the bill automatically the amortization to which they are entitled is 20 percent a year, for 5 years."[8]

[8] Hearings before Senate Committee on Finance on Second Revenue Act of 1940, 76th Cong., 3d Sess. (1940) 124.

Mr. Sullivan, who was Assistant Secretary of the Treasury at that time, also advised the Congress that all emergency facilities, *whether or not useful after the war,* should be treated alike by spreading the cost over five years or less. In testifying before the Senate Finance Committee, he further stated:[9]

> "Under this law, it may be prudent, it may be the wise thing to do; but *I couldn't say to this committee that it is reasonable to expect that an ultra-modern factory that is to be constructed in the latter part of 1940 or the first part of 1941, built with all of the latest skill and engineering experience, is going to be absolutely useless in 1946.* I don't think that is 'reasonable,' and *yet I believe it is desirable and prudent to grant this amortization to those companies that are putting up new facilities for this picture.*" (Italics supplied.)

Senator George stated: "Congress is going to rely on your judgment," and then he asked, are you "satisfied that the statute is all right?" Mr. Sullivan answered:[10]

> "MR. SULLIVAN. Yes, sir; we are satisfied that the statute is right.
>
> "SENATOR GEORGE. We take it to be your judgment on that question that these added facilities are going to become either what we now call for lack of better term, in 'obsolescence' or that the depreciation is going to absorb all the value within the statutory period that follows the issuance of this certificate.
>
> "MR. SULLIVAN. Excuse me, Senator George, that is not our judgment. We don't know that they are. We are saying that regardless of whether or not they do, it is prudent and wise to confer this special privilege of assuming that they are going to—
>
> "SENATOR GEORGE (interposing). But we are writing it in the law?
>
> "MR. SULLIVAN. That is right.
>
> "SENATOR GEORGE. After all, we are basing our decision on your judgment, plus the judgment of the National Defense Council and that of the Secretary of War."

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[9] Idem, at page 125.

[10] Idem, at page 127.

At the time this discussion occurred, subsection (f)(1) had been passed by the House and thereafter the only change was to eliminate any participation by the Council of National Defense, leaving the certifying power to the Secretaries of War and the Navy.

Petitioner submits that it would be impossible to find a plainer statement that the Congress intended, without regard to possible post-war usefulness, to permit taxpayers to amortize the entire cost of emergency facilities over the emergency period.

When Section 124 reached the floor of the House for debate, committee members who had participated in drafting the section consistently declared it was intended to grant taxpayers the absolute right to amortize the entire cost of national defense facilities over the emergency period if such taxpayers elected to do so.

Representative Boehne of Indiana, who was a member of the subcommittee of Internal Revenue Taxation which had reported Section 124 to the full committee and to the House stated (Cong. Rec., Aug. 29, 1940, page 11240):

> "Now just what do these amortization provisions do? First, they fix the useful life of facilities certified to be necessary in the national defense as 5 years. They remove all problems of proof.
>
> "Second, there is no bounty, bonus, or windfall involved. Introducing certainty into the present provision is a desirable improvement. It is designed to give the manufacturer, who is asked to furnish needed new facilities, only a fair break.
>
> "Finally, the effect of the clearing-up process is to give a straight-line basis—20 percent a year— * * *.
>
> * * * * * * * *
>
> "In the present national emergency, business is asking no favor of the Government when it merely desires the certainty that private capital expended to construct, or used to acquire, a needed new facility, certified to be necessary for the national defense, may under this law be amortized over a 5-year useful life, which is what business is being told is the present

> program. If the emergency lasts longer * * * no further deductions * * * will be allowed. The proposed amortization provisions will do no more than is fair and just. It will certainly aid national defense."

Representative Jere Cooper who was Chairman of the Subcommittee on Internal Revenue Taxation at the time Section 124 was enacted, made a similar declaration of the intention of Congress with respect to the statute (Cong. Rec., Aug. 29, 1940, p. 11246). See also *United States* v. *Milnor Corp., supra.* Nowhere in these statements is any reference whatever made to certifying a percentage of cost; likewise these statements make no distinction between the amortization privilege for facilities which might have no useful value at the end of the emergency period and those facilities which may have post-war usefulness. And, most important, there is not a shadow of suggestion that "excess war costs" should have anything whatever to do with the amount of cost to be amortized under the section.

It is worth noting, too, that Under Secretary of War Patterson, who executed the duties of the Secretary of War under Section 124, still recognized in 1945 that Section 124(f)(1) required amortization of the entire cost of facilities necessary to national defense. In his report, dated February 15, 1945, he stated (R. p. 57):

> "*Basis for new law.* In order to provide a law susceptible of *exact* calculation, it was decided that the new amortization provision should be based upon depreciation rather than loss of useful value. In other words, deduction of the *entire cost* of new defense plants was to be permitted during the period in which orders for war material continued...." (Italics supplied)

The contemporaneous views and actions of a high Administration official charged with the duty of administering the law is an important aid to statutory construction. This interpretation of the War Department is entitled to great weight as that Department participated in the draft-

ing of Section 124 and administered the statute from the date of its enactment in 1940 to December 17, 1943, when the duty of certifying was transferred to the War Production Board.

The opinion of the District Court, without adverting in any way to the foregoing and numerous other consistent declarations briefed by the petitioner, merely stated with respect to the 35 percent policy (R. p. 92):

> "... This policy limited amortization to excess war cost (estimated at 35%) in the case of facilities having presumptive postwar utility, which was found by the Board to be true of the facilities here involved. This would appear to be in furtherance of the legislative purpose to encourage capital investment in the defense effort which would not be available because of fear that such investment would have no postwar value, and at the same time maintain the amortization benefits under such control that they would not unduly injure the revenue...."

As pointed out in the dissenting opinion filed in the Court below (R. p. 109):

> "This amounts to saying that Congress intended to write into § 124 the idea of value for post-war use which was the basis of amortization under a somewhat similar provision of the Revenue Act of 1918. 40 Stat. 1078.
>
> "Under that act, if a facility had post-war useful value the difference between that estimated value and actual cost was allowed as a special amortization deduction. The legislative history of the act now under consideration convincingly demonstrates that Congress deliberately and purposefully departed from the principle of the 1918 act because experience had demonstrated it to be unsatisfactory and not productive of the desired result."

This Court has ruled again and again that in interpreting a statute it is the duty of the courts to give effect to the intent of Congress. *Ozawa* v. *United States*, 260 U.S. 178; *Helvering* v. *New York Trust Co.*, 292 U.S. 455;

United States v. *Ogilvie Hardware Co.*, 330 U.S. 709. In determining that intent, all relevant aids to construction, including the reasons for the enactment, its antecedent history in Congress, declarations of its meaning by informed members of the legislature, and its administrative construction by the agencies which had a part in developing the legislation have all been held to be pertinent considerations. *Harrison* v. *Northern Trust Co.*, 317 U.S. 476; *United States* v. *Dickerson*, 310 U. S. 554; *Adams* v. *United States*, 319 U. S. 312.

The voluminous legislative history of Section 124, of which the excerpts quoted above are typical examples, indicates the extent to which the Congressional intent has been disregarded in interpreting Section 124(f)(1). It is respectfully submitted that this Court should examine for itself the intent of Congress in the enactment of subsection (f)(1) by granting petitioner's prayer for a Writ.

b. *The decision below sustains an administrative regulation, requiring taxpayers to apply for Necessity Certificates before acquiring war facilities, a requirement which conflicts directly with both the language and legislative history of Section 124(f)(3).*

Under the guise of its authority to determine the necessity of facilities, the Board on December 17, 1943, promulgated a regulation requiring applications for Certificates to be filed prior to the acquisition of the facilities (Appendix, p. 68).

Section 124 (f)(3) states in substance that Certificates for which application was made more than 6 months after the date of acquisition of the facility shall have no force and effect for tax amortization purposes. This subsection, on its face, appears to be a directive to the Commissioner of Internal Revenue as to the validity of Certificates when presented in support of amortization deductions. There is no suggestion that the certifying agency is to have any control over the timeliness of applications for the Certi-

ficates. Such was the view of the Tax Court in *American Twist Drill Co., supra.*

The legislative history shows that Congress intended to retain control of the application date. When Section 124 was originally enacted, subsection (f)(3) required that a certificate would have no effect unless obtained *before* the date of acquisition of the facility (Second Revenue Act of 1940, approved Oct. 8, 1940). Also, subsection (f)(1) required that the certification of necessity be made "within the time specified in paragraph (3) of this subsection."

By Joint Resolution, approved January 31, 1941, the Congress made two changes in Section 124 (H. J. Res. 80, Public Law 3, 77th Cong. 1st Sess., ch. 3). The first change struck out of subsection (f)(1) the phrase referring to subsection (f)(3) quoted above. The second amendment eliminated the requirement that certificates must be obtained prior to purchase, and substituted instead a provision that Necessity Certificates would be valid for amortization purposes if application therefor was filed before the expiration of *sixty days after* acquisition.

Bearing in mind that subsection (f)(1) is the only portion of Section 124 giving the War Production Board any authority over amortization, petitioner maintains that elimination from subsection (f)(1) of the cross-reference to subsection (f)(3) was a declaration by Congress that the Board was to have no discretionary power over the time of making application for a Certificate. The amendment took from the Board any possible control it might otherwise have had over the time of filing.

Equally important, the second legislative change made in January 1941 discloses that Congress intended to retain control over the time of filing applications, and when any amendment was necessary it was to be made by Congress. This view is buttressed by the fact that in October, 1941, the Congress again amended subsection (f)(3), fixing a period of *six months after* acquisition, instead of sixty

days, for the filing of an application (H. J. Res. 235, Public Law 285, 77th Cong. 1st Sess., Ch. 464).

The opinion of the Court below disregards all of this legislative history of Congressional intent and contents itself with the following statement (R. pp. 90-91):

> "... But the statute also contemplates its implementation by regulation, and expressly provides that certification of necessity shall be under regulations prescribed from time to time by the executive officials. Under defendant's interpretation, the statute permits these officials, in the exercise of discretion, to shorten, by regulation, the time for filing applications for necessity certificates, but places an outside limit of six months on their effectiveness, beyond which executive discretion ceases. This construction would seem to be warranted, in view of the clear purpose of Congress to provide flexibility in administration to meet changing conditions and circumstances in the prosecution of the defense program; but in any event, defendant's construction being reasonable, it cannot be set aside by the courts in this proceeding."

The lower court's reasoning is erroneous. The regulation sustained destroys the purpose and plan of Congress. The purpose of the several amendments of subsection (f)(3), extending the time for filing, was to encourage industry to go forward with the acquisition of war facilities as quickly as possible—without waiting for administrative red tape (R. pp. 60-61). The Board's regulation requiring application before purchase thus defeats that plan and purpose.

Moreover, the Congressional elimination from subsection (f)(1) of any reference to the time for application provided in subsection (f)(3) deprived the War Production Board of any power, in connection with determining necessity, to regulate the time within which the applications should be filed. Again, the fact that each time administrative difficulties arose with respect to the date for filing fixed by subsection (f)(3), the Congress itself made the

change in date, conclusively shows that it never intended to, and indeed did not grant to the Board any "flexibility in administration" in respect to the filing date.

This Court has repeatedly held that in ascertaining the meaning of a statute, the Courts cannot disregard the intention of the Congress manifest by the various amendments made to the statute in issue. *United States* v. *Ogilvie Hardware Co., supra; United States* v. *Dickerson, supra; Great Northern R. Co.* v. *United States,* 315 U.S. 262; *Maul* v. *United States,* 274 U.S. 501.

Moreover, each time the date for filing application was changed it was because the War and Navy Departments brought the matter to the attention of Congress (R. p. 61). Is it likely that Under Secretary of War Patterson would bring to Congress in the midst of the national emergency a matter which it was within his discretion to remedy? Great weight is to be given the interpretation placed upon new statutes by administrative officials responsible for their development and charged with their initial administration. *Adams* v. *United States, supra; United States* v. *American Trucking Asso., supra; Norwegian Nitrogen Products Co.* v. *United States,* 288 U. S. 294.

Finally, the Court below is wrong when it concludes that the regulation is a reasonable interpretation of subsection (f)(3). Instead, it has produced absurd results—results certainly not within the Congressional purpose. The Board issued its "letter of predetermination" of necessity to the petitioner here on July 17, 1944. It stated that all the facilities listed in petitioner's application were necessary to national defense if not yet acquired. At that time, the Board did not know which items of machinery had already been purchased by petitioner. When advised, it then issued a formal Certificate, excluding the portion of machinery already acquired and ready for use as not "necessary in the interest of national defense," but including as necessary the machinery which still had to be bought. Thus, the machinery which was available and obviously urgently

useful for war manufacturing became "*not necessary,*" and machinery which might take many months to acquire and install was necessary in the war effort. This, in the midst of the war!

On the basis of results, it appears that Congress acted wisely in specifically providing that taxpayers might acquire first, and apply for certificates afterward. Plainly, the date of application had no reasonable relation to the necessity of the machinery and Congress so declared in enacting and amending Section 124 (f)(3). See *American Twist Drill Co., supra.*

When a regulation adopted by an administrative agency is inconsistent with the statutory enactment, this Court has never hesitated to strike down the regulation as invalid. That was done in *Campbell* v. *Galeno Chemical Co.,* 281 U.S. 599. There, this Court, speaking through Mr. Justice Brandeis, said (p. 610):

> "The limits of the power to issue regulations are well settled. International R. Co. v. Davidson, 257 U. S. 506, 514. They may not extend a statute or modify its provisions. The regulation of October 1, 1927, purports to revoke unexpired permits as of December 31, 1928, without resort to the proceedings prescribed by §§ 5 and 9. It thus attempts to deprive permittees of rights secured to them by these sections of the act. . . ."

Similarly, in *Manhattan G. E. Co.* v. *Commissioner of Int. Rev.,* 297 U. S. 129, this Court in an opinion of Mr. Justice Sutherland, stated (pp. 134-135):

> ". . . A regulation which * * * operates to create a rule out of harmony with the statute, is a mere nullity. * * * And not only must a regulation, in order to be valid, be consistent with the statute, but it must be reasonable. . . ."

See also *Waite* v. *Macy,* 246 U. S. 606; *Taft* v. *Helvering,* 311 U. S. 195; *Miller* v. *United States,* 294 U. S. 435.

5. The Court below has failed to apply the decisions of this Court relating to the Federal Register Act and has given an unpublished regulation of the War Production Board, limiting petitioner's amortization deduction to excess war cost, the force and effect of law, while denying effect to a conflicting regulation properly published in the Federal Register by the Commissioner of Internal Revenue.

Section 305(a) of Title 44 of the United States Code required that the regulations of the War Production Board be published in the Federal Register. The Board purported to publish all its regulations in the Federal Register. See 8 F. R. 13824; 8 F. R. 16964; 9 F. R. 2492.

However, the policy of the Board, restricting amortization certificates to 35 percent of total cost, was never published in the Federal Register, nor was it disseminated to the public in any other manner. Section 307(a) of Title 44 of the United States Code provides that no document required to be published shall be valid until filed with the Federal Register Division and made available for public inspection. Petitioner submits that the compelling conclusion to be drawn from these facts is that the Board's policy of certifying only a percentage of cost of necessary facilities for amortization purposes was invalid.

The opinion of the District Court attempts to avoid the consequences of Section 307 (a) by impliedly holding that the unpublished 35 percent policy was embraced within the scope of the following published regulation of the Board (Appendix, *infra*):

> "(3) *Determination of Necessity.* In determining whether the construction * * * or acquisition of a facility is necessary in the interest of national defense * * *, and that a Necessity Certificate may therefore be issued, the certifying authority will be guided by the following considerations:
>
> * * * * * * * * * *

"(c) *Other considerations.* The certifying authority will be guided by the following additional considerations:

* * * * * * * * *

(vi) *Government and privately financed facilities.* Necessity Certificates will be issued only where it is to the advantage of the government that the facilities in question be privately financed."

The opinion of the District Court, approved by the majority of the Court below, states with respect to the above-quoted regulation (R. pp. 91-92):

". . . Among the regulations prescribed is Section (3)(c)(vi), which provides that necessity certificates will be issued only where it is to the advantage of the Government that the facilities be privately financed. Certification under this statute, as implemented by this regulation, clearly involved an exercise of discretion, which will not be set aside unless unreasonable, arbitrary, or capricious. Here the certification was made pursuant to an established policy of the War Production Board which, after December 17, 1943, was vested with the functions of the Secretary of War and the Secretary of the Navy (Executive Order 9406). This policy limited amortization to excess war cost (estimated at 35%) in the case of facilities having presumptive postwar utility, which was found by the Board to be true of the facilities here involved. . . ."

The error of the Court's reasoning is obvious. Regulation (3)(c)(vi) merely provides that in determining whether a Necessity Certificate shall be issued at all, the Board shall take into consideration the relative advantage to the Government of having the facilities privately or publicly financed. The Court apparently entertains the view that the allowance of an amortization deduction amounts to public financing. That is patently untrue. If it were not untrue, every piece of depreciable property subject to a depreciation deduction under Section 23(l) of the Inter-

nal Revenue Code would be similarly publicly financed. Such a proposition is absurd on its face.

The regulation relied upon by the Court contains no justification for limiting the amount of the amortization deduction, once the Board has determined that it should be financed with private capital as was done in this case. It is doubtful that the Board itself believed the 35 percent policy was within the scope of this regulation on public financing, for the policy was not adopted by the Board until some months after (3)(c)(vi) was published in the Federal Register. Publication of (3)(c)(vi) was certainly no warning to taxpayers that amortization certificates were to be cut from 100 percent to 35 percent of cost. Cf. *Federal Crop Ins. Corp.* v. *Merrill, supra.*

It follows that the 35 percent policy of the Board is not within the scope of regulation 3(c)(vi), relied upon. Since the 35 percent policy was not published in the Federal Register, it can have no force and effect as to this petitioner, even if it were otherwise valid.

This Court gave tacit approval to the invalidity of unpublished executive regulations when it denied a petition for a writ of certiorari in the case of *Borak* v. *Biddle,* 141 F. 2d 278, cert. den. 323 U. S. 738. In *Federal Crop Insurance Corporation* v. *Merrill, supra,* this Court held that publication of a regulation consistent with the provisions of the Federal Crop Insurance Act was binding upon farmers claiming the benefit of that Act, even though they had no personal knowledge of the regulation. The implication of that decision is that failure to publish a regulation would invalidate it as to this petitioner.

More significant, this Court's decision in the *Merrill* case gives the conflicting regulation of the Commissioner of Internal Revenue on the same subject matter (Reg. 111, Section 29.124-6), the force and effect of law. The second paragraph of the Commissioner's regulation (Appendix, pp. 62-63) plainly declares that where an entire facility has been determined necessary in the interest of national defense by

the certifying agency, its entire cost is entitled to be amortized under Section 124. That regulation has been continuously outstanding since Section 124 was first adopted by the Congress. Petitioner submits that it cannot be set aside by a conflicting policy of which petitioner had no notice either directly or indirectly through publication in the Federal Register.

The Government in its petition for certiorari in the *Federal Crop Insurance* case, *supra,* stated as a reason for granting a writ:

> "* * * the lower Court's disregard of * * * Section 7 of the Federal Register Act * * * threatens the integrity of the system of publication and notice established by that Act."

Likewise, here the integrity and objective of the Federal Register Act will be destroyed if the lower courts are permitted to sustain as valid unpublished rules and policies affecting rights and property, on the ground that they are within the scope of published regulations which give no hint of the rule or policy ultimately invoked.

6. This case also presents the novel question of whether the regulations of the War Production Board should prevail over the properly published Regulations of the Commissioner of Internal Revenue when the regulations of the two agencies, both purporting to have statutory authority over the same subject matter, are in direct conflict.

With respect to Section 124(f)(1) of the Internal Revenue Code, the Commissioner of Internal Revenue, pursuant to his authority to prescribe rules and regulations for the enforcement of the Code, (Section 3791(a) of I. R. C.), promulgated the following regulation which was properly published in the Federal Register (Cum. Supp. to Code of Fed. Regulations, Part 29, Title 26; Appendix, pp. 62-66):

"Regulations 111, Sec. 29.124-6. (As amended by T. D. 5432, Jan. 23, 1945). Adjusted basis of emergency facility.—(a) In general.—

• • • • • • • • • •

"The unadjusted basis for amortization purposes, in cases where the entire construction, reconstruction, erection, installation, or acquisition takes place after December 31, 1939, and such construction, reconstruction, erection, installation, or acquisition is certified in its entirety by the certifying officer as necessary in the interest of national defense during the emergency period, is the same as the unadjusted basis otherwise determined."

In the present case, petitioner's "unadjusted basis otherwise determined" under the Internal Revenue Code is the total cost of the facilities because they were all acquired after December 31, 1939. And the regulation makes no mention of amortizing only a percentage of cost in such cases. The regulation continues:

"In cases where the certifying officer certifies the entire construction, reconstruction, erection, installation, or acquisition after December 31, 1939, as necessary in the interest of national defense during the emergency period, but only a portion of the construction, reconstruction, erection, installation, or acquisition attributable to the facility takes place after December 31, 1939, the unadjusted basis for the purposes of amortization is so much of the entire unadjusted basis as is attributable to that portion of the construction, reconstruction, erection, installation, or acquisition which took place after December 31, 1939. For example, the X Corporation begins the construction of a facility November 15, 1939, and such facility is completed on April 1, 1940, at a cost of $500,000, of which $300,000 is attributable to construction after December 31, 1939. The certificate of necessity covers the entire construction after December 31, 1939, and the unadjusted basis of the emergency facility for amortization purposes is therefore $300,000. For depreciation of the remaining portion of the cost ($200,000), see section 29.124-7."

The Commissioner's example, of course, allows amortization of only $300,000, not because the statute recognizes percentage certificates based on excess war cost, but because the statute limits the amortization deduction to construction or acquisition occurring after December 31, 1939.

Contrast the foregoing properly published regulation of the Commissioner of Internal Revenue with the unpublished intraoffice policy adopted by the War Production Board as the basis for issuing 35 percent certificates (R. p. 84):

> ".02 In the event that amortization should be allowed, determination as to whether it should be 100% or partial should be made as follows:
>
> "1. One hundred percent certificate will be given only when facilities to be amortized are wholly designed to manufacture end product exclusively for war purposes or for essential civilian use, and it is not reasonable to assume that they may be useful after the war.
>
> "2. Partial certificate representing excess construction or acquisition costs over pre-war costs* will be given when facilities to be amortized are *wholly designed to manufacture end product exclusively for war purposes or for essential civilian use* and it is reasonable to assume that they may be useful after the war." [Italics supplied]
>
> "* It is impossible to predict whether post-war costs will be above or below present costs, yet it appears equitable to relate them to pre-war costs. Accordingly, pre-war costs are to be used in determining this partial certificate, and as a general rule pre-war costs are to be considered as being those in effect during the years 1937-1939 inclusive."

In pursuance of the foregoing unpublished policy, the Board determined that all the facilities covered by petitioner's application of May 29, 1944, were necessary in the interest of national defense (R. pp. 35-36), but then stepped into the administrative domain of the Commissioner of Internal Revenue and declared that only excess war-cost of

petitioner's "emergency facilities" (presumed to be 35 percent of total cost) could be amortized for tax purposes.

On the other hand, the Commissioner's regulation plainly requires the amortization of the total cost of facilities determined necessary if the taxpayer so elects.

It is the petitioner's contention that Section 124(f)(1) limited the War Production Board to the power to determine the necessity of the physical facility, and after that necessity had been determined gave the Commissioner of Internal Revenue the exclusive authority with respect to the amount of cost to be amortized over the emergency period. Cf. *American Twist Drill Co., supra.*

The regulations of the two agencies are in conflict. It is the duty of this Court to determine which is valid.

The same contradictory situation prevails with respect to regulations under Section 124(f)(3) of the Code. The Commissioner of Internal Revenue adopted and published the following regulations as to the date on which application must be filed in order to obtain valid Necessity Certificates (Appendix, p. 61):

> "Sec. 29.124-1 (As amended by T. D. 5432, Jan. 23, 1945). *Certificate of necessity.*—The certification by the certifying officer that a facility is necessary in the interest of national defense during the emergency period shall have no effect—
>
> "(a) in the case of an emergency facility completed or acquired by a corporation after June 10, 1940, unless an application therefor is filed before the expiration of six months after the beginning of the construction, reconstruction, erecting, or installation of such facility or the date of its acquisition, or before December 1, 1941, whichever is later (but see section 29.124-0(b)); • • •"

The War Production Board promulgated and published in the Federal Register the following regulation (8 F. R. 16964; Appendix, p. 68):

> "(4) *Application must be filed and determination made before construction is begun or date of acquisi-*

tion. The construction, reconstruction, erection, installation or acquisition of a facility will not be deemed necessary within the terms of these regulations unless a determination of necessity is made by the certifying authority prior to the beginning of the construction, reconstruction, erection, installation or date of acquisition."

It must be apparent that the regulations of these two agencies are contradictory. The Commissioner's regulation is in accord with Section 124(f)(3); the Board's regulation is not.

Furthermore, it is petitioner's contention, and it is apparent from Section 124(f)(3), that the Board has overstepped its limited authority to issue Certificates of Necessity and has entered the area which is exclusively under the control of the Commissioner; namely, the force and effect of Necessity Certificates for tax purposes. Section 124 is a revenue statute. It ought not lightly to be inferred that a temporary war agency was authorized to share with the Commissioner of Internal Revenue the administration of the tax laws. Here again the Tax Court's decision in *American Twist Drill Co., supra,* shows the correct division of authority between the certifying agency and the Commissioner.

When two governmental agencies, both purporting to have authority over the same subject matter, adopt conflicting administrative rules, the ensuing controversy is a suitable one for the intervention of this Court. Cf. *United States* v. *I. C. C.,* 337 U.S. 426.

7. The decision of the Court below was not unanimous, and one of the two majority Judges, who as a member of the Senate Finance Committee had vigorously opposed the amortization policy, declared from the bench his continuing hostility to that policy and thereby destroyed the impression of impartiality which it is the duty of all Federal Judges to maintain.

The Division of Circuit Judges of the Court of Appeals which heard petitioner's appeal was composed of Judges Edgerton, Bennett Clark, and Wilbur K. Miller. The opinion of the District Court was adopted in a *per curiam* statement of Judges Edgerton and Clark. Judge Miller wrote a full dissenting opinion sustaining petitioner's principal contentions and finding that the District Court should be reversed.

At the time Section 124 of the Internal Revenue Code was proposed to the Congress by the National Administration, Judge Clark represented the State of Missouri in the Senate and was a member of the Senate Finance Committee to which the proposed legislation was referred. In the course of the hearings and debates on Section 124 (Sec. 302 of the Second Rev. Act of 1940), Senator Clark was a bitter opponent of the amortization policy. He expressed his views vigorously and effectively, but despite his opposition, the measure was approved by the Committee and enacted into law.

In the hearings before the Senate Finance Committee,[11] the following exchange discloses his position:

> "SENATOR CLARK. Mr. Sullivan, I understand that the excess-profits tax portion of this bill is only estimated to raise $190,000,000.
>
> "MR. SULLIVAN. Yes, sir.
>
> "SENATOR CLARK. With the situation we are in, and with the President recommending an additional four or five billion dollars every time he comes back from

[11] Joint Hearings before Committee on Ways and Means Committee on Finance, 76th Cong., 3d Sess., Aug. 9-14, 1940, p. 92.

a week-end trip, $190,000,000 is simply a drop in the bucket.

"MR. SULLIVAN. Yes, sir.

"SENATOR CLARK. Is not this excess-profits tax included in the bill as a sort of a sugar coating for the American people to swallow the amortization plan? It does not represent enough revenue to be of any considerable moment. Of course, $190,000,000 is a lot of money, but in proportion to the amount of money that we are spending, it is but a drop in the bucket.

"MR. SULLIVAN. Yes, sir.

"SENATOR CLARK. So it is included in this bill really to convey the impression to the American people that we are soaking somebody for the expense of the national-defense program, but is not the real purpose to induce the American people to swallow this amortization feature in the interest of the munitions makers?

"MR. SULLIVAN. That inquiry involves a question of motive. The Treasury started with the excess-profits tax features, the amortization plan, and suspension of the Vinson-Trammell Act; so I do not think the Treasury did have that motive.

* * * * * * * * * *

"SENATOR CLARK. Is not $190,000,000 of tax, which is merely a drop in the bucket, merely to make the amortization feature more palatable?

"MR. SULLIVAN. I do not think so. We started with the excess-profits tax before amortization was considered."

Later, on September 3, 4, and 5, 1940, hearings were held on the proposed amortization statute before the Senate Finance Committee.[12] While William S. Knudsen, Chairman of the Advisory Commission to the Council of National Defense, was testifying that the proposed statute granted taxpayers the right to amortize the entire cost of emergency facilities over a five-year period and in opposition to a proposal permitting the Government to purchase

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[12] Hearings before Committee on Finance, U. S. Senate, on H. R. 10413, 76th Cong., 3d Sess.

such facilities for $1, Judge Clark, as Senator, interjected the following questions:[13]

> "SENATOR CLARK. Would not that result in the Government having built at Government cost—both for the purpose of tax amortization and for the purpose of cost amortization— * * * a manufacturing facility which would be given as a bonus or free to the manufacturer?
>
> "MR. KNUDSEN. Yes.
>
> "SENATOR CLARK. And would that not result in an intolerable and inescapably unfair competitive condition as against the manufacturer who has not been receiving a Government war contract? * * * "

At the oral argument before the three-judge Division of the Court of Appeals, Judge Clark, in an exchange of remarks with petitioner's counsel, stated in substance that it was true that he had been very unsympathetic toward the amortization statute when it was under consideration by the Congress (R. pp. 100, 120-121). As shown in the remarks quoted above, his opposition at that time was based on the ground that the proposed law granted taxpayers the right to amortize the entire cost of emergency facilities and at the same time did not prevent the taxpayer from recovering the very same cost of emergency facilities by including such cost in the prices charged the Government for the products manufactured with those facilities. In the opinion of petitioner's counsel, Judge Clark reiterated at the hearing the same rejected views as to the undesirability of the policy adopted by the Congress in the statute, and indicated that his opposition had continued unabated through the years.

Counsel for petitioner believes that Judge Clark's opposition to the amortization law is so deep-seated that it exercised a subconscious influence over his judgment of the case in the Court below. A comparison of the majority opinion of the Court below, in which Judge Clark joined, with the statements made by him as a Senator, reveals that

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[13] Id., pp. 161-162.

the interpretation given the statute by the majority opinion directly contradicts Judge Clark's expressed understanding of the statute when he was a Senator. Two or three statements by Senator Clark, while hearings on the amortization statute were taking place before the Senate Finance Committee, will demonstrate that he then understood that Section 124 provided for amortization of the entire cost of emergency facilities over a period of five years or less. At page 146 of the Hearings before the Committee on Finance on H. R. 10413 (76th Cong., 3d Sess., September 3, 4, and 5, 1940) the following remarks appear:

> "SENATOR CLARK. In other words, if you permit corporation A, * * * receiving Government contracts during this period, * * *, [to] build a new plant, and * * * to amortize it for tax purposes over a period of 5 years, and also permit it to amortize it out of profits as to the actual cost over the period * * * you have beaten the Government out of a large amount of taxes and at the same time, at Government expense [you have] what in effect amounts to presenting corporation A with those facilities which they would own at the end of the period, * * * they would be put in an impregnable position with regard to any competitor who hadn't received Government contracts. Isn't that a fact?
>
> "MR. SULLIVAN. Yes; it is."

At pages 167 and 168 of the record of the same hearings, while John D. Biggers[14] was testifying, the following exchange of remarks occurred:

> "SENATOR CONNALLY. Well now, you are not going to give them 20 percent on the existing plant and 20 percent on the new plant too?
>
> "MR. BIGGERS. Not at all; sir. But suppose a company has a number of different plants and is manufacturing many peacetime products and adds a million-dollar plant to manufacture some defense products, that is only a small part of their total business. Their profits on that may be negligible, but their profits on

[14] Chairman of the Committee on Taxation and Finance, The Advisory Commission to the Council of National Defense.

their total business may be substantial. They would be permitted, as I understand it, under the provisions of this amortization feature of the tax bill, to deduct 20 percent of the cost of these newly created facilities from their total taxable income. In other words, if they built a million-dollar plant they would be able to deduct $200,000 a year from taxable income. Now I think that is the point we would like to make clear. In no sense is the Government, under this provision, reimbursing the taxpayer for his investment.

"SENATOR CLARK. That is true, but that is done if the Government pays an increase in the price for the goods, is it not?

"MR. BIGGERS. Yes * * * ."

Petitioner respectfully submits that the foregoing statements disclose that the proponents of Section 124 plainly stated that the statute provided for amortization of the entire cost of emergency facilities over the 5-year period and that Senator Clark fully understood that this was the purpose and meaning of Section 124, and that he based his forceful opposition to the statute on that interpretation.

In contrast, the opinion of the majority of the Court below, joined in by Judge Clark, nullifies that interpretation of Section 124 and approves a construction of the statute which deprives this petitioner of the right granted by the Congress to have amortization of entire cost in favor of a paltry 35 percent of cost, designated by the W. P. B. as "excess war cost."

The dissenting opinion filed in the Court below finds the language of Section 124 to be an "unequivocal and imperative * * * grant of a right to the deduction" of the entire cost of emergency facilities (R. p. 105). Petitioner submits that the incongruity between the language of the statute, on the one hand, and the interpretation of the statute by the majority of the Court below, on the other hand, stems in substantial part from Judge Clark's unyielding opposition as a Senator to the policy written into the statute by the majority of the Congress.

Petitioner desires to reiterate that its contention is not that Judge Clark has consciously permitted the opinions he held as a Senator to influence his opinions as a Judge. Nor does the petitioner contend that every legislator, who participated in the enactment of a statute, is thereby disqualified from serving as a judge when its interpretation is later in issue. But in this instance the statements by Judge Clark from the bench at the oral argument indicate that the scars of political battle over this particular legislation have not sufficiently healed in the intervening years to prevent his judicial mind from subconsciously seizing upon a clever administrative distortion of the statute to partially accomplish by judicial legislation what he as a Senator believed should have been done by Congress.

Within a few days after the oral argument in the Court below, counsel for petitioner filed a "Motion for Leave to File a Motion for Rehearing before the Court with All Six Justices Sitting In Banc." This Motion was duly denied by the three-judge Division which originally heard the case.

After the two to one decision of the Court of Appeals was handed down, petitioner filed a "Petition for Rehearing In Banc." This, too was denied by the three-judge Division. In that Petition a separate statement was directed to Judge Clark, suggesting reasons why he might decide, in his own discretion, that he should not sit in decision of this petitioner's appeal. It was pointed out that it is the policy of the Courts of the United States not only to be entirely impartial in their judgments but to give litigants every assurance that there is no opportunity for decisions based upon possible partiality (R. pp. 120-121).

It is with hesitancy that the petitioner in this case brings these facts before this Court. Petitioner would not do so if the Circuit Court had been unanimous in its decision. It would not do so if the opinion of the Court below had come to grips with the fundamental question of the intent of the Congress as disclosed by the legislative record, and if the prevailing opinion of the Court had given any rea-

sons to explain the obvious variance between the interpretation of the statute by Judge Clark as a member of the Senate Finance Committee and as an appellate judge. But the decision of a divided Court, based upon an opinion which does not answer petitioner's contentions and which could not have been reached without the vote of Judge Clark, leaves petitioner with an inescapable impression approaching conviction that it was not accorded the dispassionate review on appeal which is the right of every litigant.

As heretofore pointed out, petitioner is sincerely convinced that the legislative intent, as well as the language of the statute, discloses that the War Production Board had no discretion with respect to the amounts of the cost of a necessary facility which a taxpayer is entitled to amortize under Section 124. The same conviction is shared by Judge Miller in his dissenting opinion. He states (176 F.2d 868, at 872; R. p. 110):

> "After exhaustive study, I have been able to discover nothing in the language of the act, or in its legislative history, to indicate the Congress intended to give the certifying agency the right to determine that only a portion of the cost of a necessary facility could be amortized. The result in this case is so incongruous as to be almost grotesque. . . ."

The opinion of the District Court, adopted by a majority of the Circuit, offers nothing to refute Judge Miller's finding, and makes no effort to answer the petitioner's contention as to the legislative history of the intention of the Congress. Petitioner respectfully submits that in the interests of fair and impartial justice, it is entitled to have the answer.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

J. Marvin Haynes,
N. Barr Miller,
F. Eberhart Haynes,
Counsel for Petitioner.

APPENDIX OF STATUTE AND REGULATIONS.

SECTION 124 OF THE INTERNAL REVENUE CODE

(Added by Section 302, Second Revenue Act of 1940; amended by: Pub. No. 3, Jan. 31, 1941; Pub. No. 285, Oct. 30, 1941; Pub. No. 436, Feb. 6, 1942; Sec. 155, Revenue Act of 1942; Sec. 7, Tax Adjustment Act of 1945).

SECTION 124. AMORTIZATION DEDUCTION.

(a) GENERAL RULE.—Every person, at his election, shall be entitled to a deduction with respect to the amortization of the adjusted basis (for determining gain) of any emergency facility (as defined in subsection (e)), based on a period of sixty months. Such amortization deduction shall be an amount, with respect to each month of such period within the taxable year, equal to the adjusted basis of the facility at the end of such month divided by the number of months (including the month for which the deduction is computed) remaining in the period. Such adjusted basis at the end of the month shall be computed without regard to the amortization deduction for such month. The amortization deduction above provided with respect to any month shall, except to the extent provided in subsection (g) of this section, be in lieu of the deduction with respect to such facility for such month provided by section 23 (l), relating to exhaustion, wear and tear, and obsolescence. The sixty-month period shall begin as to any emergency facility, at the election of the taxpayer, with the month following the month in which the facility was completed or acquired, or with the succeeding taxable year.

(b) ELECTION OF AMORTIZATION.—The election of the taxpayer to take the amortization deduction and to begin the sixty-month period with the month following the month in which the facility was completed or acquired shall (except as provided in subsection (d) (3)) be made only by a state-

ment to that effect in its return for the taxable year in which the facility was completed or acquired. Its election to take the amortization deduction and to begin such period with the taxable year succeeding such year shall be made only by a statement to that effect in its return for such succeeding taxable year. In the case of an emergency facility completed or acquired (1) after December 31, 1939, and before June 11, 1940, by a corporation, or (2) after December 31, 1939, and before January 1, 1942, by a person other than a corporation, the taxpayer's election to take the amortization deduction and to begin such period with either the month following the month in which the facility was completed or acquired or with the succeeding taxable year shall be made only by a statement in writing to that effect to the Commissioner and shall be made before the expiration of six months after the date of enactment of the Revenue Act of 1942.

(c) TERMINATION OF AMORTIZATION DEDUCTION.—A taxpayer which has elected under subsection (b) to take the amortization deduction provided in subsection (a) may, at any time after making such election, discontinue the amortization deductions with respect to the remainder of the amortization period, such discontinuance to begin as of the beginning of any month specified by the taxpayer in a notice in writing filed with the Commissioner before the beginning of such month. The deduction provided under section 23 (l) shall be allowed, beginning with the first month as to which the amortization deduction is not applicable, and the taxpayer shall not (except as provided in subsection (d)) be entitled to any further amortization deductions with respect to such emergency facility.

(d) TERMINATION OF AMORTIZATION PERIOD.—

(1) If the President has proclaimed the ending of the emergency period (as defined in subsection (e)), or if the Secretary of War or the Secretary of the Navy has, in accordance with regulations prescribed by the Presi-

dent, certified to the Commissioner that an emergency facility ceased, on the date specified in the certificate, to be necessary in the interest of national defense during the emergency period, and if the date of such proclamation or the date specified in such certificate occurs within sixty months from the beginning of the amortization period with respect to such emergency facility, then the taxpayer may elect (in accordance with paragraph (4) of this subsection) to terminate the amortization period with respect to such emergency facility as of the end of the month in which such proclamation was issued or in which occurred the date specified in such certificate, whichever is the earlier. In such case the amortization period with respect to such facility shall end with the end of such month in lieu of the end of the sixty-month period.

(2) If the date of the proclamation or the date specified in the certificate referred to in paragraph (1) of this subsection occurs within sixty months from the beginning of the amortization period with respect to such emergency facility and after the beginning of the month which the taxpayer has previously fixed under subsection (c) for the taking, in lieu of the amortization deduction provided in this section, of the deduction allowed by section 23 (l), the taxpayer may elect (in accordance with paragraph (4) of this subsection) to terminate the amortization period with respect to such emergency facility as of the end of the month in which such proclamation was issued or in which occurred the date specified in such certificate, whichever is the earlier. In such case the amortization period with respect to such facility shall end with the end of such month in lieu of the end of the sixty-month period, and the termination of the amortization deduction under subsection (c) shall be disregarded.

(3) In the case of a taxpayer which has not elected, in the manner prescribed in subsection (b), to take an

amortization deduction with respect to an emergency facility, if the date of the proclamation or the date specified in the certificate, referred to in paragraph (1) of this subsection, whichever is earlier, is before the expiration of sixty months from the last day of the month in which such emergency facility was completed or acquired, then the taxpayer may elect (in accordance with paragraph (4) of this subsection) the amortization deduction provided in subsection (a), using an amortization period beginning with the month following the month in which the emergency facility was completed or acquired and ending as of the end of the month within which such proclamation was issued or within which occurred the date specified in such certificate, whichever is the earlier.

(4) The election provided in paragraph (1), (2), or (3) shall be made by filing with the Commissioner, in such manner, in such form, and within such time, as the Commissioner with the approval of the Secretary may by regulations prescribe a statement of such election. When such election has been so made, then, under regulations prescribed by the Commissioner with the approval of the Secretary, the taxes for all taxable years, beginning with the taxable year in which the amortization period began, shall be computed in accordance with an amortization deduction computed in accordance with the method provided in subsection (a), but using (in lieu of the sixty-month period provided in such subsection) the amortization period specified in paragraph (1), (2), or (3), as the case may be.

(5) Recomputation of Tax in Case of Election Under this Subsection.—If the adjustment of the income or excess-profits tax liability for any taxable year necessary to give effect to paragraph (4) of this subsection is prevented (A) on the date of the certificate of the Secretary of War or the Secretary of the Navy or on the date of the President's proclamation, which-

ever is the basis of the taxpayer's election under this subsection, or (B) within one year from such date, by any provision of law (other than this paragraph and other than section 3761, relating to compromises), an adjustment of the tax liability shall nevertheless be made if in respect of such taxable year a notice of deficiency is mailed or a claim for refund is filed, as the case may be, within one year after the date of such certificate or such proclamation, whichever is the basis of the taxpayer's election under this subsection. If at the time of the mailing of such notice of deficiency or the filing of such claim for refund, the adjustment is so prevented, then the amount of the adjustment authorized in this paragraph shall be limited to the increase or decrease in the tax previously determined for such taxable year which results solely from the effect of paragraph (4) of this subsection, and such amount shall be assessed and collected, or credited or refunded, in the same manner as if it were a deficiency or an overpayment, as the case may be, for such taxable year and as if on the date of such certificate or such proclamation, whichever is the basis of the taxpayer's election under this subsection, one year remained before the expiration of the periods of limitation upon assessment or filing claim for refund for the taxable year. The tax previously determined shall be ascertained in accordance with section 3801 (d). The amount to be assessed and collected under this paragraph in the same manner as if it were a deficiency, or to be refunded or credited in the same manner as if it were an overpayment, shall not be diminished by any credit or set-off based upon any item, inclusion, deduction, credit, exemption, gain, or loss, other than one resulting from the effect of paragraph (4) of this subsection. Such amount, if paid, shall not be recovered by a claim or suit for refund or suit for erroneous refund based upon any item, inclusion, deduction, credit, exemption, gain, or loss, other

than one resulting from the effect of paragraph (4) of this subsection.

(6) In the case of a taxpayer which has not elected, in the manner prescribed in subsection (b), to take an amortization deduction with respect to an emergency facility, if the date of the proclamation referred to in paragraph (1) of this subsection or the date specified in the certificate referred to in paragraph (1) of this subsection is before the completion of such emergency facility, then the taxpayer may elect (in accordance with paragraph (4) of this subsection) the amortization deduction provided in subsection (a), using an amortization period beginning with the month in which the construction, reconstruction, erection, or installation of the emergency facility was begun and ending as of the end of the month within which such proclamation was issued or within which occurred the date specified in the certificate referred to in paragraph (1) of this subsection, whichever is the earlier.

(e) DEFINITIONS.—

(1) EMERGENCY FACILITY.—As used in this section, the term "emergency facility" means any facility, land, building, machinery, or equipment, or part thereof, the construction, reconstruction, erection, installation, or acquisition of which was completed after December 31, 1939, and with respect to which a certificate under subsection (f) has been made. For the purposes of this section, the part of any facility which was constructed, reconstructed, erected, or installed by any person after December 31, 1939, and not earlier than six months prior to the filing of an application for a certificate under subsection (f), and with respect to which part a certificate under subsection (f) has been made, shall be deemed to be an emergency facility, notwithstanding that the other part of such facility was constructed, reconstructed, erected, or installed earlier

than six months prior to the filing of such application. For the purposes of this section, the part of any facility which was constructed, reconstructed, erected, or installed by a corporation after December 31, 1939, and before June 11, 1940, and with respect to which part a certificate under subsection (f) has been made, shall be deemed to be an emergency facility and to have been completed on June 10, 1940, notwithstanding that the entire facility was not completed until after June 10, 1940.

(2) EMERGENCY PERIOD.—As used in this section, the term "emergency period" means the period beginning January 1, 1940, and ending on the date on which the President proclaims that the utilization of a substantial portion of the emergency facilities with respect to which certifications under subsection (f) have been made is no longer required in the interest of national defense.

(f) DETERMINATION OF ADJUSTED BASIS OF EMERGENCY FACILITY.—In determining, for the purposes of subsection (a) or subsection (h), the adjusted basis of an emergency facility—

(1) There shall be included only so much of the amount otherwise constituting such adjusted basis as is properly attributable to such construction, reconstruction, erection, installation, or acquisition after December 31, 1939, as either the Secretary of War or the Secretary of the Navy has certified as necessary in the interest of national defense during the emergency period, which certification shall be under such regulations as may be prescribed from time to time by the Secretary of War and the Secretary of the Navy, with the approval of the President.

(2) After the completion or acquisition of any emergency facility with respect to which a certificate under

paragraph (1) has been made, any expenditure (attributable to such facility and to the period after such completion or acquisition) which does not represent construction, reconstruction, erection, installation, or acquisition included in such certificate, but with respect to which a separate certificate is made under paragraph (1), shall not be applied in adjustment of the basis of such facility and shall be considered as an expenditure with respect to a new emergency facility; and

(3) The certificate provided for in paragraph (1) shall have no effect unless an application therefor is filed before the expiration of six months after the beginning of such construction, reconstruction, erection, or installation or the date of such acquisition, or before December 1, 1941, whichever is later, except that—

(A) in the case of an emergency facility completed or acquired by a corporation after December 31, 1939, and before June 11, 1940, such certificate shall have no effect unless an application therefor is filed before the expiration of six months after the date of the enactment of the Revenue Act of 1942, and

(B) in the case of an emergency facility completed or acquired after December 31, 1939, by a person other than a corporation, such certificate shall have no effect unless an application therefor is filed before the expiration of six months after the beginning of such construction, reconstruction, erection, or installation or the date of such acquisition, or before the expiration of six months after the date of the enactment of the Revenue Act of 1942, whichever is later.

In no event and notwithstanding any of the other provisions of this section, no amortization deduction shall be allowed in respect of any emergency facility for any taxable year—

(C) unless a certificate in respect thereof under paragraph (1) shall have been made (i) prior to the filing of the tapayer's return for such taxable year, or prior to the making of an election pursuant to subsection (d)(3) or subsection (d)(6) of this section to take the amortization deduction, or (ii) before December 1, 1941, whichever is later; or

(D) in the case of an emergency facility completed or acquired by a corporation after December 31, 1939, and before June 11, 1940, unless a certificate in respect thereof under paragraph (1) shall have been made prior to the expiration of twelve months after the date of enactment of the Revenue Act of 1942; or

(E) in the case of an emergency facility completed or acquired after December 31, 1939, and before January 1, 1943, by a person other than a corporation, unless a certificate in respect thereof under paragraph (1) shall have been made (i) prior to the expiration of nine months after the last date upon which an application for such certificate may be filed, or (ii) prior to the expiration of twelve months after the date of enactment of the Revenue Act of 1942, whichever is later.

(g) DEPRECIATION DEDUCTION.—If the adjusted basis of the emergency facility computed without regard to subsection (f) of this section is in excess of the adjusted basis computed under such subsection, the deduction provided by section 23 (l) shall, despite the provisions of subsection (a) of this section, be allowed with respect to such emergency facility as if its adjusted basis were an amount equal to the amount of such excess.

(h) PAYMENT BY UNITED STATES OF UNAMORTIZED COST OF FACILITY.—If an amount is properly includible in the gross income of the taxpayer on account of a payment with re-

spect to an emergency facility and such payment is certified as provided in this paragraph, then, at the election of the taxpayer in its return for the taxable year in which such amount is so includible—

(1) The amortization deduction for the month in which such amount is so includible shall (in lieu of the amount of the deduction for such month computed under subsection (a)) be the amount so includible, but such deduction shall not be in excess of the adjusted basis of the emergency facility as of the end of such month (computed without regard to any amortization deduction for such month). Payments referred to in this paragraph shall be payments the amounts of which are certified, under such regulations as the President may prescribe, by either the Secretary of War or the Secretary of the Navy as compensation to the taxpayer for the unamortized cost of the emergency facility made because—

(A) A contract with the United States involving the use of the facility has been terminated by its terms or by cancellation, or

(B) the taxpayer had reasonable grounds (either from provisions of a contract with the United States involving the use of the facility, or from written or oral representations made under authority of the United States) for anticipating future contracts involving the use of the facility, which future contracts have not been made.

(2) In case the taxpayer is not entitled to any amortization deduction with respect to the emergency facility the deduction allowable under section 23 (l) on account of the month in which such amount is so includible shall be increased by such amount, but such deduction on account of such month shall not be in excess of the adjusted basis of the emergency facility as of the end of such month (computed without regard to any

amount allowable, on account of such month, under section 23 (l) of this paragraph).

(i) LIFE TENANT AND REMAINDERMAN.—In the case of property held by one person for life with remainder to another person, the deduction shall be computed as if the life tenant were the absolute owner of the property and shall be allowable to the life tenant.

(j) APPLICATION FOR TENTATIVE ADJUSTMENT.—Any taxpayer who has filed a statement of election as prescribed in paragraph (4) of subsection (d) may, within ninety days from the date such statement is filed, or within ninety days from the date of enactment of this Act, whichever is the later, file an application for tentative adjustment with respect to the taxes for taxable years prior to the taxable year in which such application is filed which are to be computed as required by paragraph (4) of subsection (d) as the result of such election. Such application shall be verified in the manner prescribed by section 51 or section 52 in the case of a return of such taxpayer and shall be made in such manner and form as shall be required by regulations prescribed by the Commissioner with the approval of the Secretary, and shall set forth, in such detail and with such supporting data and explanation as such regulations shall require, the recomputation of such taxes required by paragraph (4) of subsection (d) except that the tax for each taxable year to be recomputed shall be the tax for such year previously determined, ascertained in accordance with the method prescribed in section 3801 (d). If an application under section 3780(a) for tentative carry-back adjustment has been previously filed, but such adjustment has not been previously determined, then for the purpose of subsections (j) and (k), the assessments, applications, credits, and refunds provided in section 3780(b) shall be considered as having been previously made upon the basis of such application under section 3780(a). Such recomputation of tax shall be made on the basis of the items on the basis of which the tax to be

recomputed was determined. Such application shall also set forth the unpaid amount of each tax recomputed and such other information for the purpose of carrying out the provisions of subsections (j) and (k) as may be required by such regulations. An application under this subsection shall not constitute a claim for credit or refund.

(k) ALLOWANCE OF ADJUSTMENT.—Within a period of ninety days from the filing of an application under subsection (j), the Commissioner shall make, to the extent he deems practical in such period, a limited examination of the application for omissions and errors of computation, and shall determine the amount of the increase or decrease in each tax to which such application relates, on the basis of the application and the examination, except that the Commissioner may disallow, without further action, any application which he finds contains material omissions, or errors of computation which he deems cannot be corrected by him within such ninety-day period. Each increase shall be deemed determined as a deficiency and assessed, without regard to the restrictions on assessment in section 272. Each decrease shall be applied against any unpaid amount of the tax decreased, and any remainder shall be credited against the deficiencies (and interest or additions to the tax) assessed under this subsection, and any remainder shall, within such ninety-day period, be either credited against any other income, war profits, or excess profits tax, or instalment thereof, due from the taxpayer, or refunded to the taxpayer. The application, credit, or refund of a decrease determined under this subsection shall be deemed a credit or refund of an overpayment within the meaning of section 781(b).

TREASURY REGULATION 111 Relating to Income Tax Under the Internal Revenue Code.

SEC. 29.124-0 (As amended by T. D. 5432, Jan. 23, 1945). Definitions.—As used in this section and sections 29.124-1 to 29.124-9, inclusive, the term—

(a) "Certifying officer" means the Secretary of War or the Secretary of the Navy, as the case may be, or the duly authorized representative of either. The term "certifying officer" includes the Chairman of the War Production Board, or his duly authorized representative, in case any certification provided for in section 124 is made by the Chairman of the War Production Board or his duly authorized representative pursuant to Executive order.

(b) "Emergency facility" means any facility, land, building, machinery, or equipment, or any part thereof—

(1) the acquisition of which occurred after December 31, 1939, or the construction, reconstruction, erection, or installation of which was completed after such date, and

(2) any part of the construction, reconstruction, erection, installation, or acquisition of which has, under such regulations as may be prescribed by the Secretary of War and the Secretary of the Navy, or the Chairman of the War Production Board or his duly authorized representative, with the approval of the President, been certified by the certifying officer as necessary in the interest of national defense during the emergency period.

The part of any facility which is constructed, reconstructed, erected, or installed by any person after December 31, 1939, and not earlier than six months prior to the filing of an application for a certificate of necessity under section 124(f), and which is certified by the certifying officer as necessary in the interest of national defense during the emergency period, shall be deemed to be an emergency

facility, notwithstanding that the other part of such facility was constructed, reconstructed, erected, or installed earlier than six months prior to the filing of such application. If the construction, reconstruction, erection, or installation of a facility by a corporation is begun before June 11, 1940, and completed after June 10, 1940, the part of such facility which is constructed, reconstructed, erected, or installed after December 31, 1939, and before June 11, 1940, shall be deemed to be an emergency facility, provided such part is certified by the certifying officer as necessary in the interest of national defense during the emergency period.

The term "emergency facility," as so defined, may include, among other things, improvements of land, such as the construction of airports and the dredging of channels.

(c) "Emergency period" means the period beginning on January 1, 1940, and ending on the date on which the President proclaims that the utilization of a substantial portion of the emergency facilities is no longer required in the interest of national defense.

SEC. 29.124-1 (As amended by T. D. 5432, Jan. 23, 1945). Certificate of necessity.—The certification by the certifying officer that a facility is necessary in the interest of national defense during the emergency period shall have no effect—

(a) in the case of an emergency facility completed or acquired by a corporation after June 10, 1940, unless an application therefor is filed before the expiration of six months after the beginning of the construction, reconstruction, erecting, or installation of such facility or the date of its acquisition, or before December 1, 1941, whichever is later (but see section 29.124-0(b));

(b) in the case of an emergency facility completed or acquired by a corporation after December 31, 1939, and before June 11, 1940, unless an application therefor is filed before April 22, 1943; and

(c) in the case of an emergency facility completed or acquired after December 31, 1939, by a person other than a corporation, unless an application therefor is filed before the expiration of six months after the beginning of the construction, reconstruction, erection, or installation of such facility or the date of its acquisition, or before April 22, 1943, whichever is later.

SEC. 29.124-2 (As amended by T. D. 5432, Jan. 23, 1945). Amortization deduction—General rule.—If the certifying officer makes the required certification of necessity, a person is entitled, at its election, to a deduction with respect to the amortization of the adjusted basis of an emergency facility, such amortization to be based generally on a period of 60 months. As to the adjusted basis of an emergency facility, see section 29.124-6.

* * * * * * * * * *

Sec. 29.124-6. (As amended by T.D. 5432, Jan. 23, 1945). Adjusted basis of emergency facility.—(a) In general.—The adjusted basis of an emergency facility for purposes of computing the amortization deduction may differ from what would otherwise constitute the adjusted basis of such emergency facility, in that it shall be the adjusted basis for determining gain (see section 113) and in that it may be only a portion of what would otherwise constitute the adjusted basis. It will be only a portion of such other adjusted basis if only a portion of the basis (unadjusted) is attributable to the certified construction, reconstruction, erection, installation, or acquisition after December 31, 1939. It is therefore necessary first to determine the unadjusted basis of the emergency facility from which the adjusted basis for amortization purposes is derived.

The unadjusted basis for amortization purposes, in cases where the entire construction, reconstruction, erection, installation, or acquisition takes place after December 31, 1939, and such construction, reconstruction, erection, installation, or acquisition is certified in its entirety by the certifying officer as necessary in the interest of national defense

during the emergency period, is the same as the unadjusted basis otherwise determined.

In cases where the certifying officer certifies the entire construction, reconstruction, erection, installation, or acquisition after December 31, 1939, as necessary in the interest of national defense during the emergency period, but only a portion of the construction, reconstruction, erection, installation, or acquisition attributable to the facility takes place after December 31, 1939, the unadjusted basis for the purposes of amortization is so much of the entire unadjusted basis as is attributable to that portion of the construction, reconstruction, erection, installation, or acquisition which took place after December 31, 1939. For example, the X Corporation begins the construction of a facility November 15, 1939, and such facility is completed on April 1, 1940, at a cost of $500,000, of which $300,000 is attributable to construction after December 31, 1939. The certificate of necessity covers the entire construction after December 31, 1939, and the unadjusted basis of the emergency facility for amortization purposes is therefore $300,000. For depreciation of the remaining portion of the cost ($200,000), see section 29.124-7.

If the certifying officer certifies only a portion of the construction, reconstruction, erection, installation, or acquisition after December 31, 1939, then the unadjusted basis for amortization purposes is limited to the amount attributable to such portion of the construction, reconstruction, erection, installation, or acquisition after December 31, 1939. Assuming the same facts as in the example in the preceding paragraph, except that the certificate is to the effect that only 50 percent of the construction after December 31, 1939, is necessary in the interest of national defense during the emergency period, the unadjusted basis for amortization purposes is 50 percent of $300,000, or $150,000.

Where a corporation begins the construction, reconstruction, erection, or installation of a facility before June 11, 1940, and completes it after June 10, 1940, the part of such

construction, reconstruction, erection, or installation taking place after December 31, 1939, and before June 11, 1940, and the part thereof taking place after June 10, 1940, each constitutes a separate emergency facility, provided a certificate of necessity under section 124(f) has been made with respect to each such part (see section 124(e) and section 29.124-0). Furthermore, the part of such construction, reconstruction, erection, or installation taking place after December 31, 1939, and before June 11, 1940, is deemed to have been completed on June 10, 1940 (see section 124(e)(1) and section 29.124-2). Accordingly, under such circumstances, in applying the foregoing rules for determining the unadjusted basis of the emergency facility representing the part of the construction, reconstruction, erection, or installation taking place after June 10, 1940, the date "June 10, 1940" should be substituted for the date "December 31, 1939."

The adjusted basis of an emergency facility for amortization purposes is the unadjusted basis for amortization purposes less the adjustments properly applicable thereto. Such adjustments are those specified in section 113(b), except that no adjustments are to be taken into account which increase the adjusted basis. (See subsection (b) of this section.) Amounts received by a taxpayer in connection with its agreement to supply articles for national defense, though denominated reimbursements for all or a part of the cost of an emergency facility, are not to be treated as capital receipts but are to be taken into account in computing income, and are therefore not to be applied in reduction of the basis of such facility. The following examples will illustrate the computation of the adjusted basis of an emergency facility for amortization purposes:

Example (1). The X Corporation completes an emergency facility on July 1, 1940, the entire unadjusted basis of which is $500,000, and the unadjusted basis of which for purposes of amortization is $300,000. The X Corporation elects to begin amortization on January 1, 1941. The only

adjustment to basis for the period from July 1, 1940, to January 31, 1941, other than depreciation or amortization for January 1941, is $5,000 for depreciation for the last six months of 1940. The adjusted basis for purposes of amortization is therefore $300,000 less $3,000 (300,000/500,000ths of $5,000), or $297,000.

Example (2). On July 31, 1944, the Y Corporation has an emergency facility (a building) completed on July 1, 1940, the entire unadjusted basis of which is $500,000, and the unadjusted basis of which for purposes of amortization is $300,000. The corporation elects to begin amortization on January 1, 1941, by which time it is entitled to $5,000 depreciation for the last six months of 1940. On July 1, 1944, the facility is damaged by fire, as the result of which its adjusted basis is properly reduced by $200,000. The adjusted bases of the emergency facility as of July 1944 for purposes of amortization and depreciation, and the adjusted basis for other purposes, are $23,849.18, $49,250.82, and $73,100, respectively, computed as follows:

	For amortization	For depreciation	For other purposes
Unadjusted basis	$300,000.00	$200,000.00	$500,000
Less Depreciation to January 1, 1941	3,000.00	2,000.00	5,000
Adjusted basis January 1941	297,000.00	198,000.00	495,000
Less Amortization for 42 months	207,900.00	None	207,900
Less depreciation for 42 months	None	14,000.00	14,000
Adjusted basis at time of fire loss	89,100.00	184,000.00	273,100
Less fire loss (apportioned as explained below)	65,250.82	134,749.18	200,000
Adjusted basis after fire loss	23,849.18	49,250.82	73,100

The $200,000 fire loss is applied against the adjusted basis for purposes of amortization and the adjusted basis for purposes of depreciation in the proportion that each such adjusted basis at the time of such fire loss bears to their sum, i. e., 89,100/273,100ths of $200,000 or $65,250.82, against the amortization basis, and 184,000/273,100ths of $200,000 or $134,749.18, against the depreciation basis.

(b) CAPITAL ADDITIONS.—If, after the completion or acquisition of an emergency facility with respect to which a certificate of necessity has been made, further expenditures are made for construction, reconstruction, erection, installation, or acquisition attributable to such facility but not included in such certificate of necessity, such expenditures shall not be added to the adjusted basis of the emergency facility for amortization purposes under such certificate. If such further expenditures are covered by a separate certificate of necessity made in accordance with the provisions of section 124(f), they are treated as certified expenditures in connection with a new emergency facility, and, if proper election is made, will be taken into account in computing the adjusted basis of such new emergency facility for purposes of amortization.

Example. On March 1, 1942, the certifying officer certifies as an emergency facility a heating plant proposed to be constructed by the Z Corporation. Such facility is completed on July 1, 1942. The Z Corporation, on August 1, 1942, begins the installation in the plant of an additional boiler, which is not included in the certificate for the plant but is, prior to such installation, certified in a separate certificate as necessary in the interest of national defense. For amortization purposes, the adjusted basis of the heating plant is determined without including the cost of the additional boiler. Such cost is taken into account in computing the adjusted basis of the new emergency facility (the boiler), as to which the taxpayer has a separate election for amortization purposes and a separate amortization period.

* * * * * * * * * *

WAR PRODUCTION BOARD REGULATIONS.

Amended Regulations (December 17, 1943) Governing the Issuance of Necessity Certificates Under Section 124 (f) of the Internal Revenue Code, Prescribed by the Chairman of the War Production Board, With the Approval of the President.

* * * * * * * * * * *

(3) *Determination of necessity.* In determining whether the construction, reconstruction, erection, installation, or acquisition of a facility is necessary in the interest of national defense during the emergency period, and that a Necessity Certificate may therefore be issued, the certifying authority will be guided by the following considerations:

* * * * * * * * * * *

(c) *Other considerations.* The certifying authority will be guided by the following additional considerations:

* * * * * * * * * * *

(vi) *Government and privately financed facilities.* Necessity Certificates will be issued only where it is to the advantage of the government that the facilities in question be privately financed.

* * * * * * * * * * *

DONALD M. NELSON,
Chairman.

Approved: December 17, 1943.

FRANKLIN D. ROOSEVELT,
President.

* * * * * * * * * * *

Amendment to Amended Regulations (December 17, 1943) Governing the Issuance of Necessity Certificates Under Section 124(f) of the Internal Revenue Code Prescribed by the Chairman of the War Production Board With the Approval of the President.

* * * * * * * * * * *

Section 4 is amended to read as follows:

(4) *Application must be filed and determination made before construction is begun or date of acquisition.* The construction, reconstruction, erection, installation or acquisition of a facility will not be deemed necessary within the terms of these regulations unless a determination of necessity is made by the certifying authority prior to the beginning of the construction, reconstruction, erection, installation or date of acquisition.

* * * * * * * * * * *

D. M. NELSON,
Chairman.

Approved: March 2, 1944.

FRANKLIN D. ROOSEVELT.

Unpublished "Excess War Cost" Certification Policy of War Production Board.

Reprinted from Exhibits attached to Respondent's Motion to Dismiss, filed December 30, 1946 (R. pp. 48-50; 79-80; 84-85):

Form GA-141
(7-20-43)

CIRCULAR SERIES SUPPLEMENT NO. 1 TO GENERAL PROGRAM CIRCULAR

No. 33
Date: March 8, 1944

United States of America War Production Board
Page 1 of 3

To: All Bureau and Division Directors

Approved: J. A. Krug, Program Vice Chairman
Issued through: L. M. Shea Esq., Office of Procedures

SUBJECT: CRITERIA FOR PREPARATION OF RECOMMENDATIONS FOR NECESSITY CERTIFICATES ON FORM GA-1231

* * * * * * * * * * *

.02 In the event that amortization should be allowed, determination as to whether it should be 100% or partial should be made as follows:

1. One hundred percent certificate will be given only when facilities to be amortized are wholly designed to manufacture end product exclusively for war purposes or for essential civilian use, and it is not reasonable to assume that they may be useful after the war.

2. Partial certificate representing excess construction or acquisition costs over pre-war costs* will be given when facilities to be amortized are wholly designed to manufacture end product exclusively for war purposes or for essential civilian use and it is reasonable to assume that they may be useful after the war.

* * * * * * * * * * *

* It is impossible to predict whether post-war costs will be above or below present costs, yet it appears equitable to relate them to pre-war costs. Accordingly, pre-war costs are to be used in determining this partial certificate, and as a general rule pre-war costs are to be considered as being those in effect during the years 1937-1939 inclusive.

From Affidavit of Sidney T. Thomas, Chief Tax Amortization Branch, Civilian Production Administration (R. pp. 48-50):

* * * * * * * * * * *

The standards applied in the partial certification of facilities were these:

1. Postwar utility

A. Under War Production Board policy, facilities having presumptive postwar utility receive partial certification only. This policy arises out of section 3-b-2 of Executive Order 9406 which requires a finding: "that it is to the advantage of the Government that such additional facilities be privately financed." The section was designed to protect the financial interest of all of the taxpayers in a certified facility. The Government, which represents all the taxpayers, may eventually pay as much as 85 per cent of the cost of a fully certified facility, whereas if the facility were Government owned, the Government would be able, by sale or other disposition after the war, to recoup a part of its cost. Thus, the facility would have been made available for the war effort at a probable saving as compared with full certification. The saving would result no matter who is able to use the facility after the war, so that postwar utility should not be considered as limited to utility in the hands of any particular applicant.

B. Postwar utility is not restricted to usefulness to the applicant himself in his regular business, as a facility is considered to have presumptive postwar utility if it may reasonably be considered useful to anyone after the war. For example, a "standard machine tool" is always considered to have postwar utility because it can be used to produce many items other than the subject war product for which the applicant needs it. On the other hand, a "special machine tool" which can be used only to make a specific war product having no civilian use would be con-

sidered as having little or no presumptive postwar utility. Again, permanent structures, installations, and building additions are practically always to be considered as having presumptive postwar utility, while a strictly temporary structure of such construction that it could not be useful for many years might be considered to have little or no presumptive postwar utility.

II. Purpose of partial certification

Partial certification is intended to cover a liberal allowance for the excess cost of wartime acquisition or construction as compared with normal or prewar (1937-1939) costs.

III. Standard 35 per cent partial certification

A. After surveys of current and prewar costs of many types of facilities, partial certification has been standardized at 35 per cent of current costs.

B. Departure from the standard 35 per cent partial certification for facilities having presumptive postwar utility would require definite evidence that 35 per cent does not cover the increase in current costs above prewar costs. For example, if it be established that a facility currently costing $100,000 could have been built in the period 1937-39 for $40,000, a recommendation of 60 per cent certification would be in order.

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FILE COPY

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CHARLES ELMORE

IN THE

Supreme Court of the United States

October Term, 1949

No. 532

THE UNITED STATES GRAPHITE COMPANY, *Petitioner*

v.

CHARLES SAWYER, Secretary of Commerce, *Respondent*

PETITIONER'S REPLY TO BRIEF OF RESPONDENT IN OPPOSITION.

J. MARVIN HAYNES,
N. BARR MILLER,
F. EBERHART HAYNES,
Counsel for Petitioner.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

October Term, 1949

No. 532

THE UNITED STATES GRAPHITE COMPANY, *Petitioner*

v.

CHARLES SAWYER, Secretary of Commerce, *Respondent*

PETITIONER'S REPLY TO BRIEF OF RESPONDENT IN OPPOSITION.

In its petition for a writ of certiorari, petitioner advanced seven reasons for the granting of a writ in this case. Respondent ostensibly opposes the petition solely by argument that the courts below correctly decided the issues of this case on their merits, and, therefore, that it is not an appropriate case for this court to review by certiorari. Only in a few footnotes and by occasional innuendo in his argument does the respondent make reference to the reasons set forth by the petitioner as grounds for the issuance of a writ.[1]

In effect, the respondent admits to this Court that most of the petitioner's reasons for the granting of a writ are valid, but asks this Court to deny certiorari because he claims the decision below is correct. This Court is thereby requested to pass upon the merits of the issues involved without opportunity to hear the petitioner's case on the substantive questions and without giving petitioner the

[1] These references to petitioner's reasons are discussed briefly later in this Reply.

right to present its case in full and to argue the matter orally before the Court.

This is especially true as respondent has argued the case on false issues which this petitioner did not present to the Courts below. In order to make it appear that the decision below needs no review here and that it is based on long-standing precedents established by decisions of this Court (Respondent's Brief in Opposition, page 14), respondent has attempted to obscure the true issues presented and decided below. To make this statement perfectly clear to the Court a short summary of the contentions of the parties and the decision of the majority below are necessary.

From the beginning of this litigation petitioner has contended, and respondent has never denied, that Section 124(f)(1) covers two subjects:

(1) The determination of whether particular physical facilities were necessary in the interest of national defense;

(2) The amount of cost which taxpayers are entitled to amortize for tax purposes during the emergency period on account of the ownership of the facilities determined to be necessary.

Petitioner's contention at all times has been that Section 124(f)(1) gave the War Production Board (in the statute, the Secretaries of War and Navy) jurisdiction over only the first of these two matters; namely, jurisdiction to determine the necessity of facilities. Petitioner has contended that once the necessity of facilities was determined the Board's jurisdiction ended and that it had no control over the amount of cost to be amortized.

On the other hand, respondent contended below that the War Production Board had been granted jurisdiction over both the necessity of facilities and the amount of cost to be amortized.

The District Court sustained respondent and held that since the Board's jurisdiction over cost had been reasonably

exercised by certification of excess war cost only (35 percent of entire cost), the Courts could not interfere with the exercise of administrative discretion.

Now, respondent would have this Court believe that the sole question in issue is whether the War Production Board reasonably exercised its jurisdiction over the amount of cost to be amortized (Respondent's Brief, page 14). The respondent assumes that Section 124(f)(1) confers upon the Board jurisdiction over both (1) the necessity of facilities and (2) the amount of cost which owners of necessary facilities may amortize. This he does by stating that the question is "whether such reasonable exercise of discretion may be set aside by mandamus," and by further stating that this Court has uniformly answered the question in the negative, citing numerous cases. (Respondent's Brief, p. 14)

The cases cited and the argument which follows (Respondent's Brief, pp. 14-16) are all thus directed to a false issue.

The real issue between the parties, and the one which was decided by the court below, is whether Section 124(f)(1) gives the War Production Board jurisdiction to determine the amount of cost of necessary facilities which can be amortized during the emergency period.[2]

---

[2] In the interest of brevity, petitioner has limited its discussion to one of the two statutory questions involved, i.e., to the question of the Board's jurisdiction over amount of cost. What is said here on that question is equally applicable to the question of whether the Board had power to strike from Section 124(f)(3) the provision giving taxpayers six months after acquisition of a facility within which to file an application for a Necessity Certificate. Petitioner submits that Section 124(f)(3) is a mandatory directive to the Commissioner of Internal Revenue relating to the validity of a certificate and its effect for amortization purposes. There is nothing in that section or in Section 124(f)(1) granting to the administrative officer any jurisdiction over the time of applications. Yet the Board reached beyond the confines of its statutory power and nullified an express Congressional right conferred upon taxpayers. The case law applicable to these circumstances is that enunciated by Mr. Justice Brandeis in *Campbell* v. *Galeno Chemical Co.*, 281 U. S. 599, and other cases cited in the Petition for Writ, at page 31.

The issue is not, as respondent implies, whether the Board properly and reasonably exercised its jurisdiction over the amount of cost to be amortized, when it determined that only excess war cost (assumed to be 35 percent of entire cost) could be amortized.

Restated, the question here is whether the Board had any lawful authority over the amount of petitioner's annual amortization deduction. It is not, as respondent argues, whether that authority was reasonably applied.

The case of *Wilbur* v. *United States*, 281 U. S. 206, so strongly relied upon by respondent, discloses the fallacy of respondent's position. In that case, this Court first took up and decided the question as to whether the challenged decision of the Secretary of Interior had been made "in the exercise of lawful authority." Supra, at p. 218. Immediately thereafter in its opinion this Court sets out the rules for mandamus which respondent quotes at pages 14-15 of his brief. Finally, this Court's opinion states at page 221:

> "It is apparent that, *with the question of the Secretary's authority resolved against the relators,* the only question open in this proceeding is whether the decision * * * was given in the discharge of a ministerial duty controlled by mandamus or of a duty requiring the exercise of judgment and discretion not thus controllable." (Italics supplied)

Respondent has attempted to hurdle the question of "lawful authority" to act and has dealt only with the question of the reasonableness of the action. If the War Production Board had no lawful authority over the amount of cost, no amount of reasonableness can justify its determination of the amount of cost.

Riverside Oil Co. v. *Hitchcock,* 190 U. S. 316, *Work* v. *Rives,* 267 U. S. 175, and *Adams* v. *Nagle,* 303 U. S. 532 (Respondent's Brief, p. 16), all fall in the same category as the *Wilbur* case.

What has beeen said about those cases is also true of the other decisions of this Court cited by respondent. For example, a careful reading of the early case of *Decatur* v. *Paulding,* 14 Pet. 497, discloses beyond argument that the Court was dealing with a situation in which the administrative official had been granted jurisdiction over the subject matter involved. It is not a case, as is the case at bar, where the question is whether the official had jurisdiction over the subject matter—here, the amount of the cost to be amortized under Section 124.

The instant case is like *Waite* v. *Macy,* 246 U. S. 606, where the Court held through Mr. Justice Holmes that the Tea Board had exceeded its statutory authority in passing upon the quality of tea which might be imported. Also *Garfield* v. *United States ex rel Goldsby,* 211 U. S. 249.

If the principles contended for by respondent were applied to the real issue in this case, it would mean that the jurisdiction and authority of an administrative officer can always be extended beyond the limits intended and fixed by Congress by the mere assertion of the officer that the statute under which he acts has more than one meaning. (See Respondent's Brief, p. 16.)

This Court would be powerless to confine the actions of administrative officers to their legal limits if respondent's argument is accepted. Scores of decisions made by this Court must be wrong if the courts are powerless to decide whether an administrator has jurisdiction or authority over a particular subject matter in cases where the statutory language leaves room for difference of opinion.

But there has scarcely been a term during which this Court has not been called upon to adjudicate the question of whether a statute confers upon an administrator the power which he undertook to exercise. And never has the Court applied the rule of the cases relied upon by the respondent. See, for example, *Morrill* v. *Jones,* 106 U. S. 466; *United States* v. *Symonds,* 120 U. S. 46; *Garfield* v. *United States ex rel Goldsby, supra; Waite* v. *Macy, supra;*

Payne v. *Central Pacific R. Co.*, 255 U. S. 228; *Work* v. *Louisiana*, 269 U. S. 249 and cases cited at 254-255; *Campbell* v. *Galeno Chemical Co.*, 281 U. S. 599; *Manhattan G. E. Co.* v. *Commissioner of Int. Rev.*, 297 U. S. 129; *Taft* v. *Helvering*, 311 U. S. 195; *Bartels* v. *Birmingham*, 322 U. S. 126. Many cases are also collected by Mr. Justice Brandeis in *Morrison* v. *Work*, 266 U. S. 481, footnotes 7 and 8 at p. 487.

The case at bar is not unlike the case of *Garfield* v. *United States ex rel. Goldsby, supra.* There a writ of mandamus was granted by this Court to compel the Secretary of Interior to undo his unlawful action in erasing from the approved rolls of citizenship in an Indian Nation the name of one who had received an allotment certificate and was in possession of the allotted land.

Here, the Congress has directed that the entire cost of war-need facilities, acquired through private financing, should be amortized over the emergency period at the election of the taxpayer upon two conditions: (1) a determination that the facilities are necessary in the interest of national defense, and (2) the filing of an application for a Certificate not later than six months after acquisition. The War Production Board in its letter of predetermination (R. 35-36), as interpreted by the Thomas affidavit (R. 41-52), determined that petitioner's facilities were necessary in the interest of national defense. Application for a Certificate was made within six months after acquisition (R. 13-14). The Board, acting beyond the scope of its authority, issued a Certificate which went further than a determination of the necessity of the facilities in the two respects on which Congress had delegated no discretionary authority. First, the Board crossed out of the Certificate by means of red pencil those facilities which petitioner had acquired prior to the date of its application, and second, it limited petitioner's amortization deduction, for the facilities acquired after application, to 35 percent of the entire cost (R. 17), that amount representing what the Board presumed to be the excess war cost of those facilities. (R. 49).

On these facts it is readily apparent that nothing in the cases cited by respondent (Respondent's Brief, 14-16) will prevent the issuance of mandamus directing the War Production Board to strike the two limitations, which were beyond the scope of its delegated authority, from petitioner's Certificate of Necessity. This Court approved the comparable remedy of injunction where an administrative board had somewhat similarly exceeded its authority. *Waite* v. *Macy, supra.* See also *Kendall* v. *United States,* 12 Pet. 524. And in *Ex Parte Young,* 209 U. S. 123, this Court had occasion to state (at p. 159):

> "An injunction to prevent him from doing that which he has no legal right to do is not an interference with the discretion of an officer."

Why does respondent so diligently seek to avoid the issue of whether the statute conferred any jurisdiction on the Board to tamper with the amount of the amortization deduction allowable for necessary facilities? The answer is in the petition for certiorari filed with this Court. At pages 19-31, inclusive, of its Petition for Writ of Certiorari, petitioner has set forth the legislative history of Section 124. That record shows conclusively that Congress intended to withhold from the administrative body all jurisdiction over the amount of the amortization deduction of emergency facilities. Respondent has been unable to refute this evidence of the intent of Congress and has been forced to ignore it.

Petitioner does not deem it appropriate, or even proper, in a petition for a writ of certiorari to argue the merits of its case in detail. However, respondent has found no other ground than the substantive issues upon which to resist the granting of a writ. Petitioner has, therefore, been compelled to point out the completely inapposite character of the single line of cases relied upon by respondent. At the same time, petitioner wishes to point out to the Court that the only appropriate means of passing upon the substantive merit of issues so vital to national defense and safety

is to grant the petition for certiorari and give the parties an opportunity fully to present their cases.

Even though this Court has had occasion to state that it does not decide the merits of legal issues on petition for certiorari (*State* v. *Baltimore Radio Show, Inc.*, 70 S. Ct. 252), this is a case in which it would be almost impossible to draw any other conclusion if certiorari were to be denied, because respondent has contested virtually nothing in the petition except the substantive issues.

Petitioner respectfully submits that the foregoing reasons fully warrant the issuance of a writ in this case. However, because of the extreme importance of the issues, petitioner, in this Reply, will deal with two other points essential to a complete understanding of the views of the parties litigant in this proceeding. The first of these has to do with errors in the respondent's statement of the case; the second is a brief commentary on the principal reasons which petitioner has advanced for the issuance of a writ of certiorari.

Petitioner's Exceptions to Respondent's Statement of the Case.

Respondent's "Statement" (pp. 3-13) is a mixture of facts, conclusions and arguments and it has been designed to lead the Court to believe that the sole issues presented to the Courts below were that petitioner had contended that the War Production Board had abused its discretion when it shortened the period for filing an application for a necessity certificate and when it adopted the policy of including only excess war cost (35 percent of entire cost) in the certificate. As stated, these were not the questions presented to the lower Courts. The contention of the petitioner was that the War Production Board did not in either instance have any discretion to abuse, as Congress had directed when and how an application should be filed and that entire cost should be subject to amortization. It will, therefore, not be necessary to discuss in detail respondent's state-

ment. However, there are a few points which should be clarified.

In footnote 2 on page 4 of his brief, respondent implies that the Patterson Report and the Thomas affidavit are in complete agreement. The Patterson Report in no way supports respondent's contention that the War Production Board had authority to certify that only excess war costs of emergency facilities were entitled to be amortized under Section 124. Quite the opposite is true. (See Petitioner's Brief in Support of Petition, p. 25, and Record, pp. 54-57.)

In the Courts below and in its petition to this Court (pp. 32-35) petitioner contends in the alternative that even assuming that the War Production Board had discretionary power under the statute to determine that only excess war cost should be included for the purpose of the amortization deduction, the new policy which was adopted in the spring of 1944 was illegal because the same had not been published in the Federal Register, as required by law. At pages 6 and 7 respondent makes a desperate effort to show that the excess war cost rule, which was not adopted until the spring of 1944, was a part of the amended regulation which the War Department had issued on October 5, 1943[3] (respondent has included this amendment in its entirety in its appendix, p. 25). After laboring at length on pages 6 and 7 to show that the excess war cost rule was a

[3] Respondent also takes the position that the War Department amendment on October 5, 1943 embraced the War Production Board amendment on December 17, 1943, which provided that "application must be filed before construction is begun or date of acquisition" (respondent's Appendix, p. 27, ¶ 4). A comparison of this War Production Board amendment of December 17, 1943 with the War Department amendment of October 5, 1943 (respondent's Appendix, p. 25, ¶ (d)) will show that the amendment made by the War Production Board does not appear in the amendment of the War Department. Under the alternative argument advanced by petitioner in respect to the excess war cost rule, the same argument does not apply in respect to the War Production Board's action in respect to shortening the period for filing an application, as that change was published in the Federal Register while the excess war cost rule was not.

part of the amendment made by the War Department on October 5, 1943, the respondent states at page 8: "This basic change in the administration of section 124 was widely publicized, it appeared in the Federal Register, and copies of the amendment to the regulations were sent to all taxpayers who had previously filed applications, including petitioner (R. 46; and see fns. 7, 10, *infra*, pp. 9, 12)." Respondent does not deny that a change in a regulation must be published in the Federal Register, and the foregoing quotation is an admission on the part of the respondent that publication is required under the statute. This is the reason, we submit, why he has struggled so hard to make it appear that the excess war cost rule had been published in the Federal Register as a part of the War Department amendment October 5, 1943.

We will demonstrate that the excess war cost rule was not and could not have been included as a part of the amendment made by the War Department on October 5, 1943. On pages 6 and 7 respondent uses the Patterson Report to state in part what induced the War Department to terminate the granting of necessity certificates for defense plants except in a few unusual military cases. Respondent makes no reference whatever to the early part of the Patterson Report, which states that the amortization law was mandatory in character as it provides that "deduction of the entire cost of new defense plants was to be permitted during the period in which orders for war material continued" (R. 57). With this statement in the report, is it reasonable to say that the Patterson Report would, a few pages later, state that its October 5, 1943 amendment directed the granting of only excess war cost instead of entire cost? The answer is that the part of the report relied on by the respondent (R. 73-74) does not contain any statements to support the erroneous conclusion drawn by the respondent. We will briefly review that part of the report relied upon by respondent.

By the spring of 1943 it was becoming apparent that "the chief limiting factor in the production of war supplies no

longer was facility capacity but materials and manpower" (R. 72). In other words, the report says that the special amortization deduction "of the entire cost of new defense plants" (R. 57), was becoming less important to induce private capital to do the construction as the country had about caught up on defense plants. There is not a line in the report any place which indicates that the War Department had proposed any change in the provision of the statute which provided that entire cost was to be allowed as a deduction if private industry did the construction. In referring to the amendment of October 5, 1943 the Patterson Report states that "It was also provided that *certification* under this restriction *should be made only in cases of facilities* for a supply for military or naval uses, and then only after consideration of the relative advantage of government financing as against *private financing with amortization*" (R. 74) (Italics supplied). Respondent at page 7 of his brief paraphrases this quotation, but it makes no analysis of the statement. It is important to note that the statement refers only to a restriction as to certification of facilities. There is no mention of restricting the amount of cost to be deducted, and, as stated, in view of the earlier statement in the report that the statute provided for the deduction of entire cost, any such later statement would have been a contradiction. The above quotation from the report further provides that in deciding whether a particular facility (not cost) should be certified as being necessary in the interest of national defense, consideration should be given to "the relative advantage of government financing as against private financing with amortization." When the Patterson Report refers to "private financing with amortization" it necessarily must refer back to the early part of the report, which defines amortization as entire cost.

The decision made by the War Department was that the amortization deduction should be terminated, and under the statute it had a right to terminate it. However, in its termination it left the way open so that in a few special cases

where private financing in the construction was necessary in the production of supplies for the Army or Navy, such financing could be done with amortization, which meant, as the report says, the allowance of entire cost. The report states, and it was incorporated in the amendment to the regulations made on October 5, 1943, that in these unusual cases where new defense plants were necessary, consideration should be given as to whether the plant should be built with government financing or private financing, and the report would seem to indicate that wherever possible government financing was to be used, because any private financing had to be done with amortization, which meant the allowance of the entire cost deduction for tax purposes. The Patterson Report shows beyond any doubt that if any unusual cases arose after October 5, 1943 which had to be privately financed, the entire cost of the facility would be subject to amortization.

It is, therefore, absurd for the respondent to contend that the excess war cost rule was embraced in the War Department amendment dated October 5, 1943, which was duly published in the Federal Register. The amendment did not give petitioner notice of the change in respect to excess war cost.

A reading of the amendment itself (see respondent's Appendix, p. 25, item (1)) will show that there is not anything in the amendment which would place a taxpayer on notice that if it decided to invest its private capital in a defense plant and machinery its amortization deduction would be limited to excess war cost (35 percent of entire cost). The Patterson Report, relied upon by respondent, does not contain a single line to show that it had even thought of adopting a rule different from the statutory provision of entire cost where private financing was used. It is an undisputed fact that for several months after the certifying duties had been transferred to the War Production Board it had followed the War Department in including entire cost in certificates issued for defense plants and facilities. In the

Georgetown Law Journal Mr. James P. Durkin, former Chief of Section 4 of the Tax Amortization Branch of the War Production Board, a position which was similar to the one held by Mr. Sidney T. Thomas, who submitted an affidavit in behalf of respondent, states:[4]

> "When the War Production Board assumed the authority to certify, it at first adopted the statute-interpretation of the former certifying authorities by granting a 100 percent amortization deduction whenever it determined that facilities were necessary in the interest of national defense. . . ."

Mr. Durkin's statement is corroborated by the date of March 8, 1944, which is the date of the unpublished instructions of the War Production Board instructing its employees that only excess war cost should be included for emergency facilities with presumptive post-war use (R. 81). Again this is positive proof that the War Department amendment of October 5, 1943 and the amendment made by the War Production Board in paragraph (vi) of its regulations (petitioner's brief, p. 67), requiring that a necessity certificate shall not be issued unless it is to the advantage of the Government to have the facility privately financed, was not prepared for the purpose of including only excess war cost for emergency facilities with presumptive post-war use or value. These regulations were designed and approved by the President only for one purpose, which is stated in the regulations and in the Patterson report,—a necessity certificate was not to be issued unless it was to the advantage of the government to have the same privately financed. This means that if it was determined that it was to the advantage of the Government that that facility should be privately financed, which was done in the case at bar, then a certificate shall be issued and the taxpayer, if it so elects, be granted the right to deduct the entire cost of the facility for tax purposes. This was the inducement

[4] Georgetown Law Journal, Vol. 34, No. 3, p. 338.

which Congress held out to encourage private enterprise to do the constructing.

Respondent does not tell the Court that the Patterson Report shows that soon after the War Department terminated the application of Section 124 to acquisition or construction of plants and machinery except where they were used for supplies to the Army and the Navy, a protest against the termination was made by other agencies of the Government. The report states that after the October 5, 1943 amendment to the regulations, "the War Department was strongly urged to issue certificates for facilities for purposes not directly military but nevertheless claimed to be essential to national defense" (R. 74). The report shows that the Office of Defense Transportation was one of these agencies (R. 74). The transfer to the War Production Board was, therefore, made to lift the termination which had been made by the War Department so as to extend the amortization provision to facilities not directly military in character (R. 74-75). The War Production Board was selected, the report says, so that the granting of necessity certificates could be coordinated with priority ratings governing the use of critical materials (R. 75).

At page 11 of its statement, respondent implies that petitioner had notice of the change which the War Production Board had made in respect to the allowance of only excess war cost, and that notwithstanding this notice petitioner proceeded to acquire the machinery. This is not a fact. If the Court will read the amendment of October 5, 1943 made by the War Department and the amendments made by the War Production Board (Respondent's Appendix, p. 25-28), it will find that there are no statements whatever in these amendments which could have placed this petitioner on notice with respect to the unpublished excess war cost memorandum which respondent sets forth in footnote 8, page 10, of his brief.

Respondent's Almost Complete Failure to Contest Petitioner's Reasons for Granting the Writ Constitute an Admission That the Writ Should Issue.

Petitioner will very briefly discuss respondent's casual references to the principal reasons advanced for the issuance of a Writ, so that the Court will have before it the views of both parties on each reason.

1. Grave questions of public policy relating to national defense and safety are presented.

Respondent has carefully avoided direct reference to this reason. Nonetheless, respondent's statements on pages 4-5 and pages 8-11 of his brief disclose the respondent's conviction that the question is of great national importance.

Much more significant, in footnotes 9 and 18 (Respondent's Brief, pp. 11, 21-22), respondent describes the magnitude of the effect upon taxpayers of the administrative action which petitioner challenges. The importance of the question is thus admitted.

2. The decision below affects the rights and property of numerous similarly situated taxpayers.

This proposition the respondent admits (Respondent's Brief, pp. 11, 21-22), but advances an astounding proposition in an effort to answer it. He states petitioner's view will have a "necessarily disruptive and unsettling" effect, "particularly in the budgetary and tax fields" (Respondent's Brief, p. 21)[5]

Such assertion amounts to saying that the courts should not interfere because of the magnitude of the effect of the

[5] Perhaps respondent implies that tax refunds would have to be made if petitioner prevailed. Petitioner here has claimed an amortization deduction on its tax returns in 1944 and 1945 based upon the entire cost of all the facilities here in issue. Agents of the Bureau of Internal Revenue have proposed deficiencies in petitioner's tax payments, and the final disposition of the matter is being held in abeyance pending the outcome of the present litigation.

illegal administrative action. Respondent's proposition is this:

> If administrative officials make a small error inflicting a little damage on only a few, this Court may review the legality of the action and even reverse it (with the blessing of the Government), but if a major error is committed imposing large damage upon a substantial number of persons, and its correction would require time, energy and personnel, then this Court is required to shut its eyes to the illegal action and refuse even to grant a review.

If that is a correct proposition, the right of petition for certiorari should be forthwith abolished in cases of this character so that litigants will no longer be encouraged to believe that there is opportunity in this Court for redress of administrative and judicial errors.

Petitioner submits that this Court has never enunciated, and will not now adopt, explicitly or by indirection, any such policy of review by writ of certiorari.

If petitioner's contentions on the merits of this case are correct, very substantial injury has been illegally inflicted. If respondent's contentions are correct, then there is no injury. Both parties agree that if there has been illegal action, it has had very substantial adverse effect upon a number of taxpayers. In such circumstances, the issuance of a writ of certiorari is appropriate.

3. The decision below conflicts in principle with other lower court decisions interpreting Section 124.

Petitioner cited *United States* v. *Milnor Corp.*, 85 F. Supp. 931 and *American Twist Drill Co.*, 11 T. C. 200, in support of this proposition. Respondent replies in footnote 17 of his brief (p. 21) that the cases are not in conflict with the instant case because they do not involve a mandamus proceeding.

Petitioner did not contend that the two cases cited raised the same issues for decision as the case at bar. Petitioner does contend that the other courts made findings as to the Congressional intent in enactment of Section 124 which fully support petitioner here and which are squarely in conflict with the legislative intent stated by the courts below in the instant case. (Petition for Writ, pp. 17-18.)

Respondent does not, and cannot, deny that conflict. Indeed, respondent has said not one word in answer to the compelling legislative history of the meaning of Sections 124 (f)(1) and 124(f)(3). A reading of that legislative history (Petition for Writ, pp. 22-27, 28-30) will convince this Court that Congress intended Section 124 to be interpreted and administered in the manner for which petitioner contends.

4. The decision below is wrong on the substantive issues and violates legal principles laid down by this Court.

Only at this point do the briefs filed with this Court by petitioner and respondent clash. Even here, respondent has made no attempt to meet petitioner's arguments relating to statutory construction and legislative history. Instead, as demonstrated at the outset of this Reply, respondent has set up and argued a false issue. He has cited a line of cases irrelevant to the question of whether Section 124 granted the War Production Board jurisdiction over the amount of cost to be amortized and over the date upon which taxpayers must file applications in order to obtain valid Certificates of Necessity (Respondent's Brief, 13-16.)

Petitioner asks again: Where in Section 124 is the administrative agency granted any power to do more than determine whether specific physical facilities are necessary in the interest of national defense? In other words, petitioner's whole contention is that the statute gave the War Production Board no jurisdiction over the amount of cost to be amortized or over the period within which to file a

timely application. If petitioner is sustained in that contention, respondent's whole argument collapses, for nothing remains to be done but to direct the Board's successor to issue a corrected Certificate showing what its letter of predetermination (R. 35-36) already shows, namely, that the facilities were necessary in the interest of national defense.

Respondent insists upon resisting the Petition filed here solely by arguing the merits of his case on a false issue which was not presented to either Court below. Under these circumstances, this Court should not review the decision below by indirection, but should forthrightly grant the petition for issuance of a writ and thereafter hear and decide the issues after opportunity for argument and full consideration.

5. The policy of certifying only excess war cost is invalid because the rule was never published in the Federal Register as required by law and the decisions of this and other Courts.

The policy of certifying only excess war cost (estimated as 35 percent of entire cost) was not published in the Federal Register at any time. About that fact there is no dispute.

Respondent attempts to defend his failure to comply with the Federal Register Act and Court decisions thereunder by claiming that the policy of 35 percent certification was within the scope of Regulations properly published both by the War and Navy Departments and by the War Production Board (Resp's. Brief, 6-12).

In an earlier part of this Reply, petitioner has shown that the published regulations of neither the War-Navy Secretaries nor the War Production Board contained any inkling of the policy of certifying excess war costs. Petitioner will not restate that argument. However, it should be pointed out that respondent relies upon publication in the Federal Register of Section (3)(c)(vi) of the Board's regulations of December 17, 1943, as adequate notice of and

authority for certifying only excess war costs. That regulation is as follows:

> "*Government and privately financed facilities.* Necessity Certificates will be issued only where it is to the advantage of the government that the facilities in question be privately financed."

Suffice it to say that not even a "Philadelphia lawyer" can spell out of that regulation a notice that the amortization allowance would be limited to excess war cost—35 percent of entire cost—of facilities determined necessary in the interest of national defense. If this regulation is sufficient to put taxpayers on notice of the Board's 35 percent policy, the Federal Register Act has been as effectively nullified as if it had been repealed.

6. A conflict between the regulations of the Board and those of the Commissioner of Internal Revenue present a novel question which this Court should review.

Respondent devotes a footnote to this reason of the petitioner for certiorari (Resp's. Brief, footnote 14, pp. 16-17). He contends first that the administration of Section 124 was not delegated to the Commissioner, and second that the Commissioner's regulations are in accord with the action of the War Production Board.

Neither contention is correct. Section 124 is a part of the Internal Revenue Code, the administration of which is vested solely in the Commissioner except where specific authority is delegated to another agency. In the case at bar, another agency has been given limited power under one subsection of Section 124—subsection (f)(1). Petitioner submits that the power of the non-revenue agency under Section 124(f)(1) is limited to a determination of the necessity of facilities. All the residual power granted by the section remains vested in the Commissioner as the administrator of the federal revenue laws. It is not reasonable to believe that Congress would insert a section in the Internal

Revenue Code over which the Commissioner was not to have administrative jurisdiction without specifically ousting him from jurisdiction over the Section. The legislative history conclusively supports petitioner's views that the Board was granted no authority over the amount of the tax amortization deduction by Section 124. See Petition for Writ, p. 22.

The second contention of respondent with respect to the Commissioner's regulations under Section 124 is equally without merit. Respondent would have this Court believe that Section 29.124-6 of Treasury Regulation 111 (Petition for Writ, p. 63) is in accord with the Board's policy of certifying only excess war cost. When respondent speaks of "partial certification", he refers to the example in that regulation dealing with a facility which was constructed in part before December 31, 1939 and in part after that date. The law prohibits amortization of any facility or part thereof constructed or acquired on or before December 31, 1939. The example, in dealing with such situation, recognizes that the entire cost of the part of the facility constructed after December 31, 1939, is to be amortized over the emergency period. That is the interpretation of Section 124(f)(1), for which petitioner contends. The portion of the facility excluded from amortization, in the Commissioner's example, is that part which could not qualify for certification. It is the physical part of a facility which was not "necessary in the interest of national defense."

In the case at bar, the Board determined the entire facility was necessary in the interest of national defense, but as the Thomas affidavit shows (R. 50, ¶ 21) it then wrote into the certificate the illegal limitation that only the excess war cost of the necessary facility could be used in measuring the amortization deduction. The Board did not determine here that only 35 percent of the physical facilities acquired by petitioner were necessary, but instead attempted

to restrict to 35 percent the amortization deduction of facilities which were 100 percent necessary. In contrast, the Commissioner's example deals with a situation in which only part of the physical facilities were, or even could be, determined necessary to national defense.

This example was placed in the Commissioner's regulation during the period that the War and Navy Departments were allowing entire cost, and *long before the War Production Board had adopted its excess war cost rule in the spring of 1944.* It cannot, therefore, be recognition of the partial certification based on excess war cost referred to in respondent's unpublished memorandum. This will be clear from a comparison of Regulations 111 and respondent's unpublished memorandum (Pet. Br. p. 36-37).

Respondent cannot escape the conflict between the regulations of the Commissioner and the Board. It cannot be explained away. It is a conflict which this Court should resolve.

7. The two Judge opinion of the Court of Appeals was not impartial as Judge Clark from the days of his Senatorship had shown a hostile attitude against the amortization provision, and while he was serving as Senator he expressed an understanding of the statute which directly contradicts the opinion he expressed as a Judge.

This reason in support of petitioner's application was presented with great reluctance. It was prompted by the injustice which petitioner believes has been done. The facts submitted in support of this particular reason for granting the writ are either true or false (Pet. Br. p. 40-46). If they are false, respondent certainly would have challenged them. Instead, he has remained silent. We respectfully submit that his silence shows that he cannot refute the supported assertions that Judge Clark as Senator placed a different interpretation on Section 124

when it was passed by Congress than he did when he as a Judge interpreted the identical section.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 532

THE UNITED STATES GRAPHITE COMPANY, PETITIONER

v.

CHARLES SAWYER, SECRETARY OF COMMERCE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the District of Columbia (R. 87-92) is reported at 71 F. Supp. 944. The *per curiam* opinion of the United States Court of Appeals for the District of Columbia Circuit, affirming the opinion below (R. 105), is reported at 176 F. 2d 868.

JURISDICTION

The judgment of the Court of Appeals was entered on February 28, 1949 (R. 111). A peti-

tion for rehearing *in banc,* filed on March 11, 1949 (R. 112), was denied on October 13, 1949 (R. 122). The petition for writ of certiorari was filed on January 9, 1950. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTION PRESENTED

On October 8, 1940, Congress enacted Section 124 of the Internal Revenue Code which provides that taxpayers who build emergency facilities certified by the Secretaries of War or the Navy as essential to the expansion of the nation's rearmament program may elect to deduct amortization of the cost of those facilities as a federal tax deduction over five years. On May 9, 1944, petitioner applied to the War Production Board, as successor to the Secretaries of War and the Navy, for a necessity certificate covering machinery already acquired and to be thereafter acquired. On July 17, 1944, the War Production Board, acting in accordance with policies set forth in pertinent Executive Orders and Regulations promulgated under Section 124, declined certification of machinery acquired prior to that date and granted certification of 35 per cent of the cost of machinery thereafter to be acquired. In this proceeding, petitioner seeks mandatory orders to compel respondent, as successor to the War Production Board,[1] to certify 100 per cent of the cost of the

[1] Respondent's predecessors were, in the order named, as follows: Temporary Controls Administrator, Civilian Production Administrator, Chairman of the War Production Board.

machinery denied certification and 100 per cent of the cost of the machinery which was certified as to 35 per cent of its cost. The question presented is whether both courts below erred in refusing to compel a different treatment of petitioner's application by the issuance of mandatory orders.

STATUTE AND REGULATIONS INVOLVED

Section 124 of the Internal Revenue Code, 26 U.S.C. 124, and the Executive Orders and Regulations issued thereunder are set forth in pertinent part in the Appendix, *infra,* pp. 23-29.

STATEMENT

On July 17, 1944, the War Production Board, pursuant to Executive Orders and to its Regulations (Appendix, *infra,* pp. 26-29), promulgated under Section 124 of the Internal Revenue Code, issued to petitioner a percentage necessity certificate authorizing the amortization of 35 per cent of the cost of certain facilities, thereafter to be acquired, as a tax deduction over a period of five years (R. 17). Certification was denied facilities acquired by petitioner prior to July 17, 1944 (R. 35). This action, brought on September 9, 1946, attacks the validity of the Executive Orders and Regulations and prays that respondent be ordered to issue necessity certificates for 100 per cent of the cost of all facilities procured be-

(Executive Order 9841, April 23, 1947, 12 F. R. 2645; Executive Order 9809, December 12, 1946, 11 F. R. 14281; Executive Order 9638, October 4, 1945, 10 F. R. 12591; Executive Order 9406, December 17, 1943, 8 F. R. 16955.)

tween December 28, 1943, and December 15, 1944.

In opposition to this application for mandamus, respondent filed motions to dismiss and for summary judgment (R. 41, 87), supported by the affidavit of Sidney T. Thomas, Chief of the Tax Amortization Branch, Civilian Production Administration (R. 41-52).[2] On June 27, 1947, the District Court for the District of Columbia granted respondent's motion for summary judgment on the ground that respondent's construction of Section 124 was reasonable and could not be set aside in this action for mandamus (R. 91-92). A majority of the Court of Appeals for the District of Columbia Circuit (Edgerton and Clark, JJ.) affirmed *per curiam* on the opinion below, with Judge Wilbur K. Miller dissenting, on February 28, 1949 (R. 111). A petition for rehearing *in banc* was denied on October 13, 1949 (R. 122).

A brief summary of the purposes and administration of Section 124 is necessary for an understanding of the issues raised herein. At the beginning of the war emergency in 1940, the officials in charge were faced with the problem of financing the additional production capacity which was critical to the rearmament program. Two alternatives were available—government ownership of

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[2] Mr. Thomas was, during the period here involved, Acting Chief of the Tax Amortization Branch, War Production Board. The substance of the affidavit is derived in part from a report, dated February 15, 1945, by the then Under Secretary of War, Robert P. Patterson, to the Secretary of War on the administration of Section 124 (R. 52-79).

the expanded facilities,[3] or private financing. As to the second source of capital "for part of the needed expansion" (R. 53), it was found that industry was reluctant to risk capital in a program of plant expansion and conversion which might not be operative long enough to repay the cost of facilities having limited use if the usual rate of amortization for taxation were employed (R. 42).

To overcome this obstacle, Congress, on October 8, 1940, enacted Section 124 of the Internal Revenue Code as part of the Second Revenue Act of 1940. 54 Stat. 998. Section 124 estimated the probable duration of the emergency at five years, and allowed taxpayers, who built emergency facilities certified as essential by the Secretaries of War or the Navy,[4] the election of deducting amortization of the adjusted basis of an emergency facility over a period of sixty months. Section 124(a). Certification was to be under regulations prescribed by the Secretaries of War and the Navy with the approval of the President. Section 124(f)(1). The amortization period could be

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[3] The Government, acting through Reconstruction Finance Corporation and Defense Plants Corporation, constructed and owned many emergency facilities. In other instances, contracts were executed which provided that the taxpayer would expend its own funds for the construction of new facilities and would be reimbursed by the Government over a period of sixty months, title being transferred to the Government at the termination of the contract.

[4] As enacted, certification was to be made jointly by the National Defense Advisory Commission and the Secretaries of War or the Navy. The Commission's certifying authority was terminated by Joint Resolution of October 30, 1941, 55 Stat. 757.

terminated by Presidential proclamation of the end of the emergency, or by certification by the Secretaries of War or the Navy to the Commissioner of Internal Revenue that an emergency facility ceased to be necessary in the interest of national defense. Section 124(d)(1).

A detailed description of the successful administration of Section 124 as part of the plant expansion program is set forth in the Thomas affidavit and Patterson report (R. 41-79). Facilities valued at approximately five billion dollars were certified under Army and Navy administration (R. 75-76). For the purpose of this proceeding, it is only important to note the changes in policy and application made necessary by developments in rearmament needs. By the Spring of 1943, it had become apparent that the chief limiting factor in war production no longer was plant capacity but materials and manpower. Maximum war production now required, not an encouragement of facility expansion, but a curbing of it. Up to that time, almost as much effort had been devoted to the construction of necessary facilities as to the actual production of arms and munitions. (R. 72-73).

Concluding that "the need for amortization as an inducement to the private financing of such facilities had come practically to an end" (R. 77), the War Department, on June 25, 1943, requested the advice of the Office of War Mobilization. After full consideration, the Director of War

Mobilization directed the War and Navy Departments to discontinue certification but suggested that the issuance of certificates for facilities for military or naval supply might still be authorized in exceptional and limited cases where the need had been determined before expansion (R. 74). Accordingly, an amendment to the Regulations was approved by the President on October 5, 1943 (8 F. R. 13824).[5] It provided that, with the exception of facilities contracted for before the date of the amendment, no facility could be considered for certification unless the certificate was issued before the facility was acquired. Appendix, *infra,* p. 25. It also provided that further certification would be made only in cases of a shortage of facilities or supplies required for military or naval uses, and then only after consideration of the relative advantages of government financing and private financing with amortization (R. 74; Appendix, *infra,* p. 26). Simultaneously, the technical services of the War Department were advised that, where additional facilities were required and private companies which could provide them were unwilling to finance them without amortization, arrangements should be made for government financing (R. 74). The "* * * clear intention was to obtain substantial termination of the issuance of certificates" (R. 46).

[5] It should be noted that, contrary to petitioner's statements (Pet. 6, 27), this change in policy, and the issuance of regulations which embodied it, antedated the transfer of the certification function to the War Production Board.

This basic change in the administration of Section 124 was widely publicized, appeared in the Federal Register, and copies of the amendment to the regulations were sent to all taxpayers who had previously filed applications, including petitioner (R. 46; and see fns. 7, 10, *infra,* pp. 9, 12).

On December 17, 1943, the power to issue necessity certificates in all future cases was transferred by Executive Order 9406 (8 F. R. 16955) from the Secretaries of War and the Navy to the Chairman of the War Production Board. See R. 73-75. On the same date, the President approved regulations prescribed by the Chairman of the War Production Board which, in so far as the issues herein are concerned, were the same as the above-described Army-Navy regulations issued on Octobed 5, 1943 (R. 46-47; Appendix, *infra,* p. 27; 8 F. R. 16964). Both Executive Order and Regulations specified that necessity certificates should not be issued unless the Chairman of the War Production Board determined prior to the beginning of construction or date of acquisition (1) that the facilities are clearly necessary for the war effort, and (2) that it is to the advantage of the Government that the facilities be privately financed (R. 46-47).[6]

Thus, the decision on which the issuance of a necessity certificate was based required considera-

[6] These principles were repeated in Executive Order 9429 (9 F. R. 2487) on March 2, 1944, and in the Amended Regulations of the War Production Board of March 2, 1944 (9 F. R. 2492) (Appendix, *infra,* pp. 27-29).

tion of complex factors. More careful recognition of the relative advantage of public ownership and private financing under Section 124, now made possible by achieved plant expansion, was required by the ever increasing impact of the amortization privilege on the revenue structure (R. 45). Amortization, an abnormal tax deduction, involved a loss of revenue to the Government which, in the case of companies in the higher tax brackets, might amount to 81% of the cost of the facilities (R. 80, 85). And if the facilities concerned could reasonably be considered useful after the war to the applicant in his regular business, or to anyone else, the Government, if it financed the facilities, would be able to recoup a part of its cost by sale or other disposition after the war (R. 48).

To implement the Presidential directive that necessity certificates would thereafter be issued only where it was to the advantage of the Government that the facilities in question be privately financed, a memorandum was prepared by the Tax Amortization Branch, War Production Board on February 9, 1944, to control processing of applications.[7] The memorandum advised that (R. 80):

* * * * *

> In determining whether it is to the advantage of the Government that the facilities

[7] As shown above, pp. 7-8, the Executive Orders and regulations issued pursuant thereto, here in issue, were duly published in the Federal Register. Memoranda and circulars

be privately financed, consideration must be given to the probable marketability or useful value of the facility after the war. It is recognized that there is no way by which post-war value can be definitely determined at this time. Any facility which will not have a reasonably wide market may be assumed to to have relatively little post-war sales value, and therefore, it would be to the best interest of the Government that it be privately financed. On the other hand, if a facility appears to be of such a type that it would have a reasonably wide market after the war, it may generally be assumed that, provided the DPC or other government agency is willing to purchase it, it would be to the advantage of the Government that it be publicly rather than privately financed with a 100 percent certificate. It may still be advantageous to the Government to have private financing under a certificate if a percentage certificate were issued, such percentage being based, for example, on excess cost attributable to the war.[8]

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issued for the guidance of Government officials in processing applications for the amortization privilege under Section 124 were, of course, matters of internal management and Federal Register publication was not required. It should be noted that the amortization program under Section 124 was terminated, on September 29, 1945, prior to the effective date of the Administrative Procedure Act, 5 U.S.C. 1011. See Proclamation No. 2669, 10 F. R. 12475.

[8] A circular dated March 8, 1944, approved by J. A. Krug, then Vice-Chairman of the War Production Board, set forth, the following criteria for preparation of recommendations for necessity certificates (R. 84):

* * * * *

.02 In the event that amortization should be allowed,

After surveys of current and pre-war costs of many types of facilities, the basic standard for partial certification was fixed at 35 per cent of current costs. Departure from this figure, when justified by evidence, was authorized and partial certification in fact ranged from 20 per cent to 80 per cent (R. 49, 51).[9]

On May 29, 1944, after the foregoing principles had been established, petitioner applied to the War Production Board for a necessity certificate

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determination as to whether it should be 100% or partial should be made as follows:

1. One hundred percent certificate will be given only when facilities to be amortized are wholly designed to manufacture end product exclusively for war purposes or for essential civilian use, and it is not reasonable to assume that they may be useful after the war.

2. Partial certificate representing excess construction or acquisition costs over pre-war costs will be given when facilities to be amortized are wholly designed to manufacture end product exclusively for war purposes or for essential civilian use and it is reasonable to assume that they may be useful after the war.

3. Partial certificate will be given in appropriate percentages under certain other circumstances of an ~~ordinary~~ extraordinary nature. The following are examples:

a. When part of the facilities are appropriate for government financing and part for a 100% certificate, a percentage certificate may be issued for the entire project at a percentage which will result in same amount of tax amortization that would have been allowed had the individual items been considered separately.

* * * * *

[9] These general principles and policies were applied to 11,435 applications for necessity certificates by the War Production Board. Of these, 2,074 were approved, 4,268 were denied in part, 3,671 were totally denied, and 1,422 were withdrawn. In approximate dollar value, the total amount covered by applications for certificates was $1,498,730,000. Of this amount, $701,163,000 was approved and $797,567,000 was denied (R. 51).

for facilities for its new plant.[10] At various dates from October 21, 1943, to December 16, 1943, priorities had been granted by the War Production Board for the purchase of such facilities,[11] and acquisition and installation had began on December 28, 1943. Procurement of the facilities was completed on December 15, 1944 (R. 13).

On July 17, 1944, the War Production Board sent to petitioner a "Letter of Predetermination" which stated, in accordance with the Executive Orders and Regulations, that facilities acquired subsequent to the date of the letter were eligible for tax amortization on a 35 per cent basis (R. 35). After petitioner filed an affidavit showing

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[10] In 1943, demand for Graphitar, a graphite product manufactured by petitioner for use in the fabrication of marine and aircraft engines, began to exceed the capacity of petitioner's plant and plans were made to more than double the plant capacity (R. 7). On June 27, 1943, petitioner filed an application under Section 124 with the Secretary of War for a necessity certificate for the cost of a new plant. On October 28, 1943, the Secretary of War issued a necessity certificate for 100 per cent of the cost of the plant (R. 11). A priority was granted on October 29, 1943, and petitioner began construction (R. 10).

The priority issued to petitioner was AA-3, but there were several priorities higher than this on the preference scale. It should be noted in this connection that the granting of priorities called for different considerations and for the application of different standards than those entering into the issuance of necessity certificates. The power to grant priorities was derived from an entirely separate law, the Second War Powers Act (50 U.S.C. App. 631), and was administered under different Executive Orders—No. 9040 (7 F. R. 527); No. 9125 (7 F. R. 2719); No. 9638 (10 F. R. 12591). The issuance of a priority was in no sense a determination of necessity within the meaning of Section 124. Countless items were acquired by virtue of priorities for which tax amortization would not have been and was not granted.

[11] See fn. 10, *supra*.

the cost of facilities acquired on or after July 17, 1944, the War Production Board, on August 1, 1944, issued petitioner a necessity certificate dated July 17, 1944. The certificate provided (R. 17):

> It Is Hereby Certified that the facilities described in the attached Appendix A (consisting of 9 pages)[12] are necessary in the interest of national defense during the emergency period, up to 35% of the cost attributable to the construction, reconstruction, erection, installation or acquisition thereof, * * *.

On September 9, 1946, petitioner filed this suit, alleging that it was wrongfully denied amortization of $175,813.35. Of this amount, $77,195.99 represents facilities acquired prior to July 17, 1944, and $98,617.36 represents 65 per cent of the cost of facilities acquired after July 17, 1944 (R. 24). As indicated above, p. 4, both courts below declined to issue the requested orders.

ARGUMENT

In this proceeding for mandamus, petitioner seeks to compel respondent, in his official capacity (R. 1), to do two things: (1) to issue a certificate for 100 per cent of the cost of facilities as to which certification was denied; and (2) to issue a certificate for 100 per cent of the cost of facilities as to which only 35 per cent of the cost was certified.

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[12] Appendix A listed the facilities shown in petitioner's application for a certificate. Facilities designated as having been received before July 17, 1944, were crossed over in the form of an "X" by red pencil (R. 17).

Both courts below have held that respondent's refusal to grant such certificates is grounded upon a reasonable interpretation of respondent's discretionary powers under Section 124. The question raised herein, whether such reasonable exercise of discretion may be set aside by mandamus, is not novel and has uniformly been answered by this Court in the negative.[13] *Decatur* v. *Paulding,* 14 Pet. 497, 515; *Gaines* v. *Thompson,* 7 Wall. 347; *Litchfield* v. *Register and Receiver,* 9 Wall. 575, 577; *Carrick* v. *Lamar,* 116 U.S. 423, 426; *Riverside Oil Co.* v. *Hitchcock,* 190 U.S. 316, 324; *West* v. *Hitchcock,* 205 U.S. 80, 85; *Ness* v. *Fisher,* 223 U.S. 683, 691-692; *Alaska Smokeless Coal Co.* v. *Lane,* 250 U.S. 549, 555; *Hall* v. *Payne,* 254 U.S. 343, 347; *Work* v. *Rives,* 267 U.S.175, 183; *Wilbur* v. *United States,* 281 U.S. 206, 218; *I. C. C.* v. *New York, N. H. & H. R. Co.,* 287 U.S. 178, 203; *United States ex rel. Chicago Gt. Western R. R.* v. *I. C. C.,* 294 U.S. 50, 62; *United States ex rel. Girard Co.* v. *Helvering,* 301 U.S. 540, 543; *Adams* v. *Nagle,* 303 U.S. 532, 542.

The rule is precisely stated in *Wilbur* v. *United States, supra,* at pp. 218-219:

> Mandamus is employed to compel the performance, when refused, of a ministerial duty,

[13] Whether this be called an action for an order in the nature of a writ of mandamus or for a mandatory injunction, is immaterial. In substance and effect a mandatory injunction is the precise equivalent of a writ of mandamus, and its issuance is governed by identical considerations. *Gaines* v. *Thompson,* 7 Wall. 347, 352; *Miguel* v. *McCarl,* 291 U.S. 442, 452; cf. *Warner Valley Stock Co.* v. *Smith,* 165 U.S. 28, 33.

> this being its chief use. It also is employed to compel action, when refused, in matters involving judgment and discretion, but not to direct the exercise of judgment or discretion in a particular way nor to direct the retraction or reversal of action already taken in the exercise of either.
>
> * * * Where the duty in a particular situation is so plainly prescribed as to be free from doubt and equivalent to a positive command it is regarded as being so far ministerial that its performance may be compelled by mandamus, unless there be provision or implication to the contrary. But where the duty is not thus plainly prescribed but depends upon a statute or statutes the construction or application of which is not free from doubt, it is regarded as involving the character of judgment or discretion which cannot be controlled by mandamus.

And it applies with as much force to the construction of statutes as to the determination of questions of fact. *Decatur* v. *Paulding, supra; Ness* v. *Fisher, supra; Hall* v. *Payne, supra; Work* v. *Rives, supra.* Even if his construction of the statute be erroneous, mandamus will not issue to compel the administrative official to act upon one construction rather than another. The interpretation need only be reasonable. "Whether he decided right or wrong, is not the question. Having jurisdiction to decide at all, he had necessarily jurisdiction, and it was his duty to decide as he thought

the law was, and the courts have no power whatever under those circumstances to review his determination by mandamus or injunction." *Riverside Oil Co.* v. *Hitchcock, supra,* at pp. 324-325. And see *Work* v. *Rives, supra,* at 183; *Adams* v. *Nagle, supra,* at 542.

Accordingly, to obtain the relief which it here asks, petitioner must affirmatively demonstrate that the action taken by respondent's predecessors was completely arbitrary and devoid of authority under Section 124. The petition falls far short of the required showing. It discloses, at best, an alternative reading of Section 124 and the scope of administrative power thereunder—an inflexible reading which fits the needs of petitioner's case but which was rejected, as not corresponding either to the complex requirements of national rearmament or to the intent of Congress by all the responsible executive officials, including the President, who administered the plant expansion program, and by both courts below.[14]

In effect, petitioner reads Section 124 as if it

[14] In saying that all responsible executive officials concurred as to the proper interpretation and administration of Section 124 in so far as here under attack, *i.e.*, the changed policy of administration inaugurated by the Secretaries of War and Navy and followed by the War Production Board, we are not unmindful of petitioner's repeated insistence that a different view was taken by the Commissioner of Internal Revenue (Pet. 2-3, 9, 35-39). The administration of Section 124 and the power to issue war necessity certificates thereunder was not, in any way, delegated to or entrusted with the Commissioner of Internal Revenue. It was essential that the administration of Section 124 be in the same hands that controlled the complex and constantly changing needs of the overall war program. The Commissioner's sole function in the picture was

were a rigid contract between Congress and industry.[15] Petitioner ignores the vital control delegated by Congress to the Executive branch over the administration of Section 124, a control apparent in the terms of the act itself and underscored if the statute be placed, as it must be, in its proper setting. The entire expansion of needed plant capacity for the rearmament program might possibly have been accomplished through Government ownership of all facilities. A great part of our expanded plant capacity was publicly financed and constructed. However, in view of the need for haste, as the then Under Secretary of War Robert P. Patterson pointed out in his report to the Secretary of War on the administration of Section 124, we had to expand to the full "within the framework of the system of private enterprise, not only because that was the system in which we

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to prescribe the methods to be employed in preparing returns by taxpayers who had received war necessity certificates. However, if the Commissioner's views be considered relevant to the present case, it should be noted that his view accords with and recognizes the position taken by those officials who administered the amortization program. Section 29.124-6 of Treasury Regulation No. 111, quoted on page 63 of the petition, specifically recognizes partial certification for amortization purposes. This recognition of partial certification destroys petitioner's reliance on the Commissioner's regulation, as to the 35 per cent certificate here under attack. There is, of course, nothing in the Commissioner's regulations which gives aid or comfort to petitioner's other contention, namely, that the issuance of a war necessity certificate should be compelled where it was totally denied as to facilities acquired before the date of application.

[15] Petitioner does not contend that the actions of the respondent's predecessor were not authorized by the regulations then in effect. His contention is rather that the regulations were not authorized by the statute (R. 90-91).

believed, but also because it was the system we had" (R. 77-78). Therefore, for part of the needed expansion of capacity, it was thought desirable, particularly in view of the short-term and specialized nature of many of the projects, to encourage the investment of private capital by the grant of a tax privilege. Section 124 was enacted in 1940 to provide that encouragement and to supplement Government financing.

Section 124 was an emergency measure in a field "* * * full of technical and difficult detail * * *" (R. 77). In order that its objective might be achieved with protection against waste and abuse, Congress provided for a great deal of flexibility in its administration. The Secretaries of War and Navy, subject to the approval of the President, were given a rule-making power as to certification of facilities. Section 124(f)(1). Power to terminate the amortization privilege entirely or in particular cases, when warranted, was granted. Section 124(d)(1).

By the end of 1943, the character of the paramount needs of the rearmament program had changed. The critical factor no longer was additional plant capacity, but the utilization of existing capacity. In fact, there was need to curb and control expansion so as to channel men and resources into production. It was then both possible and necessary to give consideration to the ever-increasing impact of amortization upon the public revenue. As stated above, p. 6, approximately 5

billion dollars of expanded capacity was financed under the Section 124 privilege during the Army-Navy administration of the statute. Accordingly, the general amortization program was terminated except as to unusual and limited cases. To control and limit amortization effectively, Executive Orders and regulations were prescribed which directed that no facilities would be certified unless the certifying authority determined prior to the acquisition of the facilities that they were physically necessary and that it was to the advantage of the Government that they be privately financed under Section 124 rather than by the Government.[16] Applying these principles in the instant case, the War Production Board declined to certify facilities which had been acquired prior to any determination of necessity and certified that only 35 per cent of the cost of facilities thereafter to be acquired was necessary (R. 50). The Board found, as to the partially certified machinery, that it was likely to have a broad market and general value at the end of the war and be of use for normal peacetime production (R. 50).

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[16] If the facilities concerned could reasonably be considered useful after the war to the applicant in his regular business, or to anyone else, the Government, if it financed the facilities, would be able to recoup a part of its cost by sale or other disposition after the war. Thus, where the facilities had relatively little post-war value, it was in the best interests of the Government to grant a necessity certificate. On the other hand, it was to the Government's advantage that facilities with post-war value be publicly financed. Alternatively, it might be advantageous to the Government that facilities with post-war value be privately financed under less than 100 per cent of cost amortization. See R. 48 and 80.

The establishment of the above described policy and its application in this case was a reasonable exercise of discretionary powers necessarily granted to the certifying authorities and well within the scope of their rule-making and termination powers. On broad grounds, therefore, petitioner's challenge must fail.

The same result obtains if the petition be viewed more narrowly. Petitioner's fundamental contentions appear to be: (1) that petitioner has a right to file an application for a certificate within 6 months after the facilities have been acquired; and (2) that, as to facilities certified as necessary, petitioner has an automatic right to 100 per cent amortization of the cost of its facilities certified as necessary. In basing its prayer for mandatory orders on these contentions, petitioner overlooks the actual facts in the case. Assuming that petitioner had a right to file an application within six months after acquisition of the facilities, it could not compel favorable action on the application. There can be no doubt that certifying authorities exercised discretion in passing upon applications. Thus, as to its pre-acquired machinery never found to be necessary and as to which certification was declined, the order which petitioner seeks would not be one directing the performance of a "mere ministerial act." On the contrary, such an order would constitute certification by the court.

The same analysis applies to the machinery which was partially certified. Petitioner continu-

ally makes the incorrect assumption that such machinery was certified as necessary in its entirety, that the certification was improperly conditioned, and that the only remaining problem is to direct recognition of the 100 per cent amortization privilege which automatically flows from certification. The letter of predetermination and the certificate, the basic evidence as to the nature of the determination made, merely state that the machinery was necessary up to 35 per cent of its cost (R. 17, 35). There is nothing to indicate that any certification would have been made, had the certifying authorities been compelled to choose between 100 per cent or nothing. Again, an order changing the 35 per cent certificate to a 100 per cent certificate would not be a mere correction but would, in fact, be a certification by court order.

CONCLUSION

For the foregoing reasons, we submit that the petition should be denied.[17] We think it relevant to note the necessarily disruptive and unsettling result of petitioner's view, particularly in the budgetary and tax fields.[18] Cf. *Hurley* v. *Kincaid*,

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[17] *United States* v. *Milnor Corp.*, 85 F. Supp. 931 (E.D. Pa.) and *American Twist Drill Co.* 11 T. C. 200 (Pet. 17-19), are not in conflict with the instant case. Neither of these two cases involve the question whether mandamus would issue to review the decision of the certifying authority to require a predetermination of necessity and to grant only a partial certificate.

[18] The magnitude of reopening the amortization program cannot be over emphasized. Eleven thousand four hundred and thirty-five applications were received and considered by the War Production Board. Of these, 2,074 were approved, 4,268 were denied in part, 3,671 were totally denied, and 1,422 were withdrawn. In approximate dollar value, the total

285 U.S. 95, 104; *Duncan Townsite Co.* v. *Lane*, 245 U.S. 308, 311-312; *Decatur* v. *Paulding*, 14 Pet. 497, 516. Force is added to this consideration by the fact that petitioner is requesting judicial intervention to obtain a tax concession, a matter of legislative grace in which courts have been traditionally reluctant to interfere with administrative determinations. *Williamsport Co.* v. *United States*, 277 U.S. 551; *Heiner* v. *Diamond Alkali Co.*, 288 U.S. 502, 507; *New Colonial Ice Co.* v. *Helvering*, 292 U.S. 435, 440; *Helvering* v. *Inter-Mountain Life Ins. Co.*, 294 U.S. 686, 689; *Welch* v. *Obispo Oil Co.*, 301 U.S. 190; *James F. Waters, Inc.* v. *Commissioner*, 160 F. 2d 596 (C.A. 9); and see *First Securities Corp.* v. *Clements*, 103 F. 2d 1011 (C.A. 6).

Respectfully submitted,

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FEBRUARY, 1950.

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amount covered by applications for certificates was $1,498,730,000. Of this amount, $701,163,000 were approved and $797,567,000 denied (R. 51). The reopening now of all these applications may well be an insurmountable undertaking. The Department of Commerce has dismissed all former Civilian Production Administration and War Production Board employees who were employed in the Tax Amortization Branches thereof and is now merely a custodian of the records.

APPENDIX

Section 124 of the Internal Revenue Code, 54 Stat. 998, as amended by the Act of October 21, 1942, 56 Stat. 798, 849-851, 26 U.S.C. 124, provides in pertinent part as follows:

(a) *General rule.* Every person, at his election, shall be entitled to a deduction with respect to the amortization of the adjusted basis (for determining gain) of any emergency facility (as defined in subsection (e)), based on a period of sixty months. Such amortization deduction shall be an amount, with respect to each month of such period within the taxable year, equal to the adjusted basis of the facility at the end of such month divided by the number of months (including the month for which the deduction is computed) remaining in the period. Such adjusted basis at the end of the month shall be computed without regard to the amortization deduction for such month. The amortization deduction above provided with respect to any month shall, except to the extent provided in subsection (g) of this section, be in lieu of the deduction with respect to such facility for such month provided by section 23(l), relating to exhaustion, wear and tear, and obsolescence. The sixty-month period shall begin as to any emergency facility, at the election of the taxpayer, with the month following the month in which the facility was completed or acquired, or with the succeeding taxable year.

* * * * *

(d) *Termination of amortization period.*

(1) If the President has proclaimed the ending of the emergency period (as defined in subsection (e)), or if the Secretary of War or the Secretary of the Navy has, in accordance with regulations prescribed by the President, certified to the Commissioner that an emergency facility ceased, on the date specified in the certificate, to be necessary in the interest of national defense during the emergency period, and if the date of such proclamation or the date specified in such certificate occurs within sixty months from the beginning of the amortization period with respect to such emergency facility, then the taxpayer may elect (in accordance with paragraph (4) of this subsection) to terminate the amortization period with respect to such emergency facility as of the end of the month in which such proclamation was issued or in which occurred the date specified in such certificate, whichever is the earlier. In such case the amortization period with respect to such facility shall end with the end of such month in lieu of the end of the sixty-month period.

* * * * *

(f) *Determination of adjusted basis of emergency facility.* In determining, for the purposes of subsection (a) or subsection (h), the adjusted basis of an emergency facility—

(1) There shall be included only so much of the amount otherwise constituting such adjusted basis as is properly attributable to such construction, reconstruction, erection, installation, or acquisition after December 31, 1939,

as either the Secretary of War or the Secretary of the Navy has certified as necessary in the interest of national defense during the emergency period, which certification shall be under such regulations as may be prescribed from time to time by the Secretary of War and the Secretary of the Navy, with the approval of the President.

* * * * *

(3) The certificate provided for in paragraph (1) shall have no effect unless an application therefor is filed before the expiration of six months after the beginning of such construction, reconstruction, erection, or installation or the date of such acquisition, or before December 1, 1941, whichever is later, * * *

* * * * *

The relevant Executive Orders and Regulations approved by the President, which were issued under Section 124, provide in pertinent part as follows:

(1). 8 F.R. 13824 (October 5, 1943):

The Regulations governing the issuance of Necessity Certificates under Section 124(f) of the Internal Revenue Code, prescribed by the Secretary of War and the Secretary of the Navy, and approved by the President May 22, 1942, as amended (7 F.R. 4233), are amended as follows:

Add to paragraph 3a subparagraph, as follows:

(d) The construction, reconstruction, erection, installation, or acquisition of a facility

shall not be deemed necessary unless (1) the beginning of the construction, reconstruction, erection, installation, or the date of acquisition of such facility, was prior to October 5, 1943; or (2) an application for a Necessity Certificate describing such facility was filed before October 5, 1943; or (3) the Secretary of War or the Secretary of the Navy, in exceptional cases, has determined prior to the beginning of such construction, reconstruction, erection, installation, or the date of such acquisition, that there is a shortage of facilities for a supply required for military or naval uses and that it is to the advantage of the Government that additional facilities for such supply be privately financed.

(2). Executive Order 9406, 8 F.R. 16955 (December 17, 1943):

* * * * *

3.(b) In acting upon applications for Necessity Certificates filed on and after October 5, 1943, describing facilities the construction, reconstruction, erection, or installation of which was not begun or which were not acquired prior to October 5, 1943, Necessity Certificates shall not be issued unless the Chairman of the War Production Board has determined prior to the beginning of the construction, reconstruction, erection, installation, or the date of acquisition of the facilities (1) that the facilities to be constructed or acquired are clearly necessary for the war effort, and (2) that it is to the advantage of the Govern-

ment that such additional facilities be privately financed.

* * * * *

(3). 8 F.R. 16964 (December 17, 1943):

The following regulations are hereby prescribed by the Chairman of the War Production Board, with the approval of the President, pursuant to the authority contained in Executive Order 9406, dated December 17, 1943.

* * * * *

(3)(c) * * *

(vi) *Government and privately financed facilities.* Necessity Certificates will be issued only where it is to the advantage of the government that the facilities in question be privately financed.

* * * * *

(4) *Application must be filed before construction is begun or date of acquisition.* The construction, reconstruction, erection, installation or acquisition of a facility will not be deemed necessary within the terms of these regulations unless a determination of necessity is made by the certifying authority prior to the beginning of the construction, reconstruction, erection, installation or date of acquisition.

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(4). Executive Order 9429, 9 F.R. 2487 (March 2, 1944):

* * * * *

3. (b) In acting upon applications for Necessity Certificates filed on and after October

5, 1943 describing facilities the construction, reconstruction, erection, or installation of which was not begun or which were not acquired prior to October 5, 1943, or for which the applicant had not made contracts for the construction, reconstruction, erection, installation or acquisition thereof prior to October 5, 1943, Necessity Certificates shall not be issued unless the Chairman of the War Production Board has determined prior to the beginning of the construction, reconstruction, erection, installation, or the date of acquisition of the facilities (1) that the facilities to be constructed or acquired are clearly necessary for the war effort, and (2) that it is to the advantage of the Government that such additional facilities be privately financed.

* * * * *

(5). 9 F.R. 2492 (March 2, 1944):

The amended regulations (December 17, 1943) governing the issuance of Necessity Certificates under section 124(f) of the Internal Revenue Code (8 F.R. 16964) prescribed by the Chairman of the War Production Board with the approval of the President (*supra*) are amended as follows:

* * * * *

Section 4 is amended to read as follows:

(4) *Application must be filed and determination made before construction is begun or date of acquisition.* The construction, reconstruction, erection, installation or acquisi-

tion of a facility will not be deemed necessary within the terms of these regulations unless a determination of necessity is made by the certifying authority prior to the beginning of the construction, reconstruction, erection, installation or date of acquisition.

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